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Speeding up Sexual Assault Trials: A Constructive Critique of India's Fast-Track Courts

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Article

Speeding Up Sexual Assault Trials: A Constructive Critique of India's Fast-Track Courts

Vandana Peterson†

India has a strong tradition of judicial activism for social change and comprehensive laws designed to combat sexual violence against women. Yet such crime has significantly escalated. In December 2012, a widely publicized assault occurred in Delhi. The victim's death triggered a frantic response from many quarters including legal scholars, religious leaders, global media, and government officials. The central government undertook a comprehensive review of existing mechanisms to deter future crimes against women. Its findings led to the creation or designation of "fast-track" courts to adjudicate cases involving sexual crime against women.

This Article posits that designating "special" courts to hear cases of sexual crime can significantly deter such crime, and implicitly address the social norms which typically motivate such crime. However, the fast-track courts that have been established by the central and state governments of India, with minimal logistical or legislative backing, fall short of making any lasting or normative progress. To that end, this Article suggests best practices from specialized courts in other jurisdictions including specialized domestic violence courts in the United States.

Parts I and II describe the contemporary challenges faced by Indian society in the area of sexual violence against women. Parts III and IV describe the history and evolution of fast-track courts and identify areas for improvement. Part V suggests incorporating elements borrowed from

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similarly situated specialized court systems (specifically, the U.S. domestic violence courts). In particular, this Article argues that by adopting elements of information sharing, community engagement, collaboration, individualized focus on victims, and ongoing outcome monitoring into their daily operations, fast-track courts can elevate the deterrent impact of prosecution and punishment by influencing social norms.

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INTRODUCTION

On the night of December 16, 2012, a twenty-three year old student, Jyoti Pandey, was returning home after watching a movie with her friend, twenty-eight year old Awindra Pandey.¹ A taxi driver agreed to take them part of the way, but they had a difficult time finding anyone to drive them the remainder of the distance to the suburb where Pandey lived. When the two came across a private bus that appeared to have four passengers and announced their destination as one of the stops on its route, they took pause but then climbed on, reassured by the presence of the other passengers. The nightmarish events that then occurred took the international media by storm. The five men in the bus attacked Pandey and her companion. Each one took turns driving while Pandey was raped and tortured by the others. Her companion was beaten with an iron rod. Close to 10pm, they were thrown from the bus and—after surviving an attempt to run them over—passersby eventually noticed their bloodied bodies and brought them to the attention of local police.²

The media coverage of the attack was unprecedented. Its alarming brutality, in contrast with the mundane familiarity of sexual assault, resonated with the public. The government of India arranged for Pandey to receive the best medical care possible and airlifted her to a specialty hospital in Singapore. On December 28, 2012, against the backdrop of a global outcry and after providing a detailed report of what had happened, Pandey lost her battle for survival and succumbed to the extensive physical damage that her body had suffered.

Seven months later, on July 31, 2013, an eighteen-year old female call-center operator was sexually assaulted by a group of men at an abandoned building, the site of the erstwhile-Shakti Mills in Mumbai.³ On August 22, 2013, a twenty-two year old photojournalist on assignment in Mumbai was attacked and raped by five men at the same site.⁴ The young woman had been trying to photograph the Shakti Mills building for her assignment on the city's tenements. Three of the perpetrators were repeat offenders whose practice was to entrap and rape women at the site of the abandoned building.⁵

In September 2013, less than a year after Jyoti Pandey's death and just a few weeks after the Mumbai attacks, the men responsible were convicted

1. Though they share the same name, Jyoti Pandey and Awindra Pandey are not related; "Pandey" is a common last name in India.

2. Jason Burke, *Delhi Rape: How India's Other Half Lives*, GUARDIAN (Sept. 10, 2013), <http://www.theguardian.com/world/2013/sep/10/delhi-gang-rape-india-women>.

3. Sharmeen Hakim, *Shakti Mills Monsters Convicted; Their Families Continue to Suffer*, MUMBAI MIRROR (Mar. 21, 2014), <http://www.mumbaimirror.com/mumbai/cover-story/Shakti-Mills-monsters-convicted-their-families-continue-to-suffer/articleshow/32379191.cms>.

4. *Id.*

5. See S. Ahmed Ali, *Shakti Mills Gang-rape Accused Assaulted 10 Women in 6 Months*, TIMES OF INDIA (Sept. 4, 2013), <http://timesofindia.indiatimes.com/city/mumbai/Shakti-Mills-gang-rape-accused-assaulted-10-women-in-6-months/articleshow/22273845.cms>.

and sentenced to death.⁶ The rapid court timeline for the Pandey case was virtually unprecedented in Indian judicial history.

In the immediate aftermath of Pandey's rape and death, the Indian government appointed a commission to investigate and to recommend changes to the criminal justice system. This commission was comprised of three judicial luminaries: former Chief Justice of the Supreme Court, J.S. Verma, retired Justice Leila Seth, and Solicitor General Gopal Subramaniam.⁷

The "Justice Verma Report" the commission produced dealt comprehensively with the issue of violence against women, including sexual violence. Drawing on the Fourth Conference of Women, convened by the United Nations Commission on the Status of Women in Beijing in 1995, the Justice Verma Report defined violence against women as

any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.⁸

Spurred by the Justice Verma Report and the Indian Law Commission, the central government of India, in conjunction with the government of Delhi, called for and funded a controversial scheme of "fast-track courts" or "FTCs" to try crimes of violence against women, including sexual violence.⁹ Although the central government implemented certain reforms in India's criminal laws and procedures¹⁰ to help expedite the prosecution of sexual crime, there was no central legislation passed to establish or specify the procedures in the sexual crime fast-track courts.¹¹ Consequently, fast-track

6. Ram Singh, the alleged leader of the men, died in prison awaiting trial. Another defendant was seventeen at the time of the crime and was therefore sentenced according to juvenile procedure. Despite public outcry, he was released in December 2015. *Profiles: Delhi Gang Rapists*, BBC NEWS (Dec. 20, 2015), <http://www.bbc.com/news/world-asia-india-23434888>.

7. J.S. VERMA ET AL., REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW (2013) [hereinafter JUSTICE VERMA REPORT], http://www.thehindu.com/multimedia/archive/01340/Justice_Verma_Comm_1340438a.pdf.

8. *Id.* at 67; see also Declaration on the Elimination of Violence Against Women art. 1, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993). The U.N. definition also includes the violation of human rights of women in situations of armed conflict. United Nations Fourth World Conference on Women, Beijing, China, Sept. 4-5, 1995, *Rep. on the Fourth World Conference on Women*, at 48-49, U.N. Doc. A/CONF.177/20/Rev.1 (Jan. 1, 1996).

9. See Nita Bhalla, *India Opens Fast-Track Courts After Delhi Gang Rape*, THOMSON REUTERS FOUNDATION (Apr. 10, 2013), <http://www.trust.org/item/?map=india-opens-fast-track-courts-after-delhi-gang-rape-report/>.

10. See The Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India) [hereinafter, Criminal Law (Amendment) Act, 2013], <http://indiacode.nic.in/acts-in-pdf/132013.pdf>.

11. See JAYNA KOTHARI & APARNA RAVI, CTR. FOR LAW & RESEARCH POL'Y, THE MYTH OF SPEEDY AND SUBSTANTIVE JUSTICE: A STUDY OF THE SPECIAL FAST TRACK COURTS FOR SEXUAL ASSAULT AND CHILD SEXUAL ABUSE CASES IN KARNATAKA 4 (2015), <http://clpr.org.in/wp-content/uploads/2015/06/Fast-Track-Courts-Report-Final.pdf> (highlighting the importance of a legislative foundation "setting out the purpose of these courts, their mode of functioning

courts contain gaps in their day-to-day procedures, staffing, and training of personnel that pose challenges to their very *raison d'être* (detering sexual crime). These shortcomings present problems for the credibility, consistency, accessibility, and viability of the fast-track system.

While the fast-track courts are not an entirely new construct in India, until recently, they had never focused on sexual violence. In addition to their specialized subject matter, fast-track courts operate on an accelerated timeline under specially streamlined procedures whereby trials are to be completed within two months after initiation, and conducted without adjournment unless absolutely necessary.¹² Although they are said to have better infrastructure and funding, in many ways they resemble the existing courts in the Indian justice system.¹³ The fast-track courts are ostensibly earmarked to handle all permutations of violence against women, including sexual violence by an intimate partner, acquaintance, stranger, or the state.¹⁴ Despite the breadth and scope of the many iterations of violence against women, this Article posits that all violence against women is a manifestation of unequal power between sexes and the domination and subjugation of victims through sexist oppression that is condoned by socio-cultural norms.¹⁵ This Article deals specifically with sexual violence against women as demonstrated in the cases discussed.

or any special procedures to be followed . . .").

12. Criminal Law (Amendment) Act, 2013, ¶ 21 (amending CODE CRIM. PROC. § 309 (1973) (India)).

13. See Rukimini S., *As Funds Dry Up, Fast-Track Courts Close Down*, THE HINDU (Aug. 17, 2014), <http://www.thehindu.com/news/national/as-funds-dry-up-fasttrack-courts-close-down/article6324428.ece>. The funding and infrastructure appears to vary from state to state. For instance, in the state of Karnataka, the fast-track courts were established pursuant to a Government Order, with little thought or instruction provided as to how they would actually operate. See KOTHARI & RAVI, *supra* note 11, at 3.

14. By way of context, the Declaration on the Elimination of Violence Against Women identifies different kinds of violence against women, including: "(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (b) Physical sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; (c) Physical, sexual and psychological violence perpetrated or condoned by the state, wherever it occurs." The Declaration on the Elimination of Violence Against Women art. 2, *supra* note 8.

15. As Gloria Steinem and Lauren Wolfe explained in a recent opinion piece, "The use of sexualised violence . . . is the result of the cult of masculinity—some men become addicted to it and feel they have no identity without it . . . Neither in war zones nor in street gangs is rape primarily about sex. It is sexualised violence whose motive is power, control and proving a false image of manhood. None of this will ever change unless we focus on creating a culture in which there is no cult of masculinity—and no cult of femininity that excuses or even supports it." Gloria Steinem & Lauren Wolfe, *Sexual Violence Against Women is the Result of the Cult of Masculinity*, GUARDIAN (Feb. 24, 2012), <http://www.theguardian.com/commentisfree/2012/feb/24/sexual-violence-women-cult-masculinity>. As a result, educational initiatives and programs aimed at undoing widespread societal misogyny and patriarchy might be crucial complements without which legislation and judicial intervention will not succeed. However, this Article is concerned with the opportunities for legal and judicial reform to impact violence against women. Therefore, this Article will not address the various educational, media, and other initiatives that are employed to combat sexual violence against women.

Sexual violence against women has long since been a challenge to the protection of basic human rights in South Asia; however, Pandey's rape and death in Delhi reignited the debate and compelled the national government to create several fast-track courts to address the problem of violence against women by bringing perpetrators to justice.¹⁶

Since then, the alleged gang rape and murder of two teenage cousins in rural Uttar Pradesh state¹⁷ has sparked dialogue about caste¹⁸ violence and police complicity in sexual crimes. The unique culture of impunity that fuels such crimes makes fast-track courts—with their dual emphasis on speed and punishment—particularly well-suited to address violence against women with underlying socioeconomic causes. For example, in rural settings, violence against women often manifests as rape by upper caste men against lower caste women,¹⁹ and in urban settings by lower-class, uneducated men against women who seem educated and upwardly-mobile.²⁰ In both cities and in villages, such crime is garnering increased attention in the national and international media.

"This is a time when [a] serious crime against a woman has come to the fore and now [it is the] judiciary's responsibility to instill confidence among the women," said Judge Yogesh Khanna, the fast-track judge who sentenced the four men convicted of the brutal gang rape that resulted in Jyoti Pandey's death.²¹ Increasing speed of criminal prosecutions appears to be a common response when governments come under global scrutiny.²²

16. Preetika Rana & Tripti Lahiri, *The Verdict on Fast-Track Trials*, WALL ST J. (Sept. 11, 2013), <http://blogs.wsj.com/indiarealtime/2013/09/11/the-verdict-on-fast-track-trials/>.

17. Initially, police investigations and autopsy reports suggested that the two cousins were gang raped and murdered by hanging from a mango tree in the rural town of Badaun, Uttar Pradesh, by members of a superior caste. See Sugam Pokharel & Katie Hunt, *Investigation of India Girls' Hangings Finds No Evidence of Rape, Murder*, CNN (Nov. 27, 2014), <http://www.cnn.com/2014/11/27/world/asia/india-girls-hanging-case/>. However, in the national uproar and media spotlight on the incident, India's Central Bureau of Investigation conducted further investigation and concluded—possibly because of political pressure to avoid caste-based conflict in the region—that the young women were not raped and murdered but rather, took their own lives. *Id.*

18. The word "caste" has been variously defined and there is no consensus as to a precise definition. 1 DIWAN BAHADUR L. K. ANANTHAKRISHNA IYER, *THE MYSORE TRIBES AND CASTES* 140 (1935). For the purpose of this article, "caste" can be understood as the strict, stratified and hierarchical socio-economic organization of society, predominant in rural India, which has roots in Sanskrit religious texts. For further discussion on the origins and definition of caste, see *infra*, Part I.A.

19. "Dalit women are threatened by rape and gang rape as part of showing that the caste is dominated by the higher castes in India. The statically evident [sic] shows that day by day the atrocities against dalit women especially rape is increasing in India." G. Shunmuga Sundaram et al., *Dalit Rape Victims: An Analysis of Victim Justice in India*, in REPORT OF THE SECOND INTERNATIONAL CONFERENCE OF THE SOUTH ASIAN SOCIETY OF CRIMINOLOGY AND VICTIMOLOGY 150, 152 (K. Jaishankar & Natti Ronel, eds., 2013).

20. See *infra* Part I.B.

21. *Delhi Gang-Rape Case: Death Sentence for All Four Convicts*, TIMES OF INDIA (Sept. 13, 2013), <http://timesofindia.indiatimes.com/india/Delhi-gang-rape-case-Death-sentence-for-all-four-convicts/articleshow/22547783.cms>.

22. In Zambia, fast-track courts have been introduced for similar reasons to combat gender-based violence. See, e.g., Mwape Mwenya, *Fast-Track Court to Improve Justice Delivery*, ZAMBIA DAILY MAIL (Feb. 3, 2016), <https://www.daily-mail.co.zm/?p=58144> (reporting on the

Judge Yogesh Khanna's sentencing opinion in the Jyoti Pandey case stated: "These are the times when gruesome crimes against women have become rampant and courts cannot turn a blind eye to the need to send a strong deterrent message to the perpetrators of such crimes."²³ In addition to deterrence, the court appeared to acknowledge the normative value that judicial decision-making could have:

The increasing trend of crimes against women can be arrested only once the society realize (sic) that there will be no tolerance from any form of deviance against women and more so in extreme cases of brutality such as the present one and hence the criminal justice system must instill confidence in the minds of people especially the women.²⁴

However, the potential for normative change, by means other than severe punishment—such as incorporating victim-centered approaches and procedures into daily operations—is lost or completely overlooked.²⁵ This may be due in part to the evolution and history of the sexual crime fast-track courts, which were preceded by India's existing fast-track court system. These courts were originally funded and established by the central government on a purely ad hoc basis as a temporary solution to alleviate overwhelming case dockets in the criminal courts.²⁶ In recent years, the government has adopted a similar fast-track model to help curb impunity for sexual crimes in India.

This Article draws on the experiences of specialized or problem-solving courts, primarily domestic violence courts in the United States, to suggest ways in which Indian fast-track courts can incorporate norm-changing elements into their daily operations. Doing so can help transform harmful social norms for the better. A conscientious effort on this front is particularly important because the normative change that is called for is not the condemnation of rape or sexual violence against women, but that of misogyny and sexist oppression, which are still widely condoned. By fully

roll out of fast-track courts to improve justice delivery for gender-based violence claimants in Zambia). In East Africa, where global scrutiny has recently been on piracy, the international community has established fast-track courts to prosecute suspected pirates. See, e.g., *Kenya Opens Fast-Track Piracy Court in Mombasa*, BBC NEWS (June 24, 2010), <http://www.bbc.co.uk/news/10401413> (reporting about on-going efforts of the Kenya government to prosecute suspected pirates).

23. *State v. Ram Singh & another*, (2013) S.C. No. 114/2013 (India), available at <http://online.wsj.com/public/resources/documents/DelhiRape.pdf>.

24. *Id.*

25. See e.g. Kathryn Abrams, "Fighting Fire with Fire": Rethinking the Role of Disgust in Hate Crimes, 90 CALIF. L. REV. 1423, 1424 (2002) (discussing avenues—other than increasing the severity of punishment for perpetrators—for "producing the moral or normative realignment necessary to reduce the incidence of [hate] crimes," relating to Arab-Americans after September 11, 2001).

26. See *Brij Mohan Lal v. Union Of India & Ors.*, (2012) 5 S.C.R. 305 (discussing the central government's decision to cease funding the fast-track courts and assign financial responsibility to individual states).

integrating the various moving parts of the criminal justice system through increased information sharing, community engagement, collaborative partnerships with an individualized focus on victims, and continuous monitoring of outcomes, the Indian criminal justice system can exemplify the change which Judge Yogesh Khanna called for in his recent opinion.

I. SEXUAL VIOLENCE AGAINST WOMEN IN INDIA

As the crimes in Delhi, Mumbai and Badaun demonstrate, sexual violence against women in India frequently implicates caste or socio-economic distinctions. Such caste and other socio-economic factors play a significant role in (1) the impetus for committing sexual violence and (2) causing such crimes to go unpunished.²⁷ As a result, the following section will discuss the socio-cultural context of sexual violence in India and identify potential areas for normative change that the fast-track courts should undertake in order to deter gender-based violence in the future.

A. Rural India

Caste, which is the prevalent socio-economic structure of rural India, is the "stratified and hierarchical socio-economic organization of society that evolved as India's ancient civilizations, (with its own social order, moral and ritual codes), absorbed the nomadic, Sanskrit speaking Aryan populations who crossed the mountain passes from the steppes of Central Asia and settled in Northern India."²⁸ Originating out of necessity for the ancient Hindus, the four "original" castes were allegedly developed as society and specializations evolved beyond tilling the soil to denote the following functions: priest, warrior, merchant and artisan. With time they

27. For instance, studies have shown that a high prevalence of rape is linked to social phenomena, rather than the mental depravity of the perpetrator:

Numerous studies have . . . found that men who rape are "normal" to the extent that psychologists fail to find evidence of abnormality . . . Researchers have consistently failed to find significant psychological differences between the rapist and nonrapist populations. There is simply no evidence, save the rape itself, suggesting that all or even most rapists are objectively depraved. Nonetheless, a tendency to rape can be linked to objective variables. Macrosociological research on rape strongly suggests that the prevalence of rape is positively correlated with a variety of social phenomena, including the acceptance of gender inequality, the prevalence of pornography, and the degree of social disorganization in a community.

Katherine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 577-78 (1997) (citations omitted).

28. Ekta Singh, *Caste System in India: A Historical Perspective*, at x-xi (Jan. 21, 2014) (unpublished thesis, Bundelkhand University), http://shodhganga.inflibnet.ac.in/bitstream/10603/15272/6/06_introduction.pdf. The word "caste" has its origins in the Portuguese word "casta" which means breed or race. In Sanskrit, the word is "varna" which varies in meaning depending on context but is often interpreted to signify color, as in skin color (e.g. priests are fair, warriors are reddish, merchants are yellow and artisans are black). *Id.* at xi.

devolved further to delineate a fifth group, the “outcasts” or “untouchables,” who occupy the fringes of society, performing such functions as scavenging or cleaning latrines and funeral sites. It is safe to say that the caste system is ancient and resilient.²⁹

Caste membership can blur the line between right and wrong, erasing morality and accountability. Therefore, it is also particularly conducive to oppression, crime, and violence. Latin American scholars have called this a pervasive sense of “impunity,” in reference to a corollary to caste-based sexual violence that exists in South America.³⁰ While the Latin American example stems from inequalities in political status and economic class, the connection between status/class inequalities and crime resembles the connections between caste and crime in India. In Argentina, rapists with power are those with “access to public resources . . . controlled by ruling families and clientelistic political networks.”³¹ In Mexico, “the perpetrators of corporate crimes are members of mafia gangs associated with political and business networks that link the participation in social activities, entertainment, and sexual pleasures to access to economic, social, and political resources in a given territory.”³² Rather than increased scrutiny deriving from their visibility in the local community, the laissez-faire attitude of law enforcement and judicial officials means that perpetrators with a sense of superiority and power based on their “upper caste” status feel invincible.

Historically, India’s criminal justice system and courts have been ineffective deterrents for crime because they prescribe little to no consequences for the perpetrators of sexual violence against Dalit³³ women,

29. Jeremy Sarkin & Mark Koenig, *Ending Caste Discrimination in India: Human Rights and the Responsibility to Protect (R2P) Individuals and Groups from Discrimination at the Domestic Levels*, 41 GEO. WASH. INT’L L. REV. 541, 547-48 (2009) (“While the narrative origins of the basic *varna* divisions are clear, the origins of the *jatis* are not as well-defined. The *jatis* are the divisions that we understand as caste today. They are divisions based on occupation, linguistic and geographic limitations, customs, and other sociological features that are manifested in strict hierarchies existing at every level of society.”).

30. See Claudia Lozano, *The Free Market and Gender Relations: Political and Economic Power, Impunity, and the Murder of Women*, 5 SEATTLE J. SOC. JUST. 661, 676 (2007) (citing sexual crimes in Mexico and Argentina as examples of impunity through the exercise of political and economic power and control).

31. *Id.* at 677-78 (describing a 1990 case in which “María Soledad Morales, a sixteen-year-old girl, was raped, murdered, and mutilated by a group of young men with the support of the Catamarca provincial police. María Soledad was last seen alive in a club in Catamarca with her boyfriend and his friends, sons and nephews of high-ranking government officials. Three days later, passers-by discovered María Soledad’s raped and mutilated body on the side of a dusty road. Sexual violence, including that which leads to the death of the victim, is not unusual practice in Argentina, but this case hit the provincial and national headlines because it unleashed a wave of civil disobedience. Essentially, the young girl had been handed over by her boyfriend to the perpetrators of the crime. These were politically ‘loyal’ men and/or were related to the ruling elite, whereas María Soledad and her boyfriend did not belong to any socially privileged group. The rape and murder highlighted the existence of extreme violence and continued existence of relationships of domination.”) (citations omitted).

32. *Id.* at 676.

33. For the purposes of this article, the term “Dalit” is used to denote the lowest members of the Indian caste hierarchy. The self-designation of “Dalit” replaces other generic names for persons descended from “untouchable” castes, who are considered ritually impure, restricted

including those who are gang raped, typically by upper caste men.³⁴ Dalit women, such as the teenagers in Badaun, occupy the bottom of both the caste and gender hierarchies, and are therefore especially susceptible to violence.³⁵ Inadequate enforcement of the laws in the criminal justice system exacerbates the problem.³⁶ In cases of sexual violence against lower-caste individuals, this is typified by police resistance when victims attempt to file complaints, weak prosecution, low conviction rates, easy acquittals, high pendency, and the absence of any victim-oriented relief.³⁷ The failure to investigate, file, and pursue cases involving crimes against lower caste victims

has a deleterious effect not only on the individuals harmed in each instance of violence, but more broadly on the communities in general . . . empower[ing] potential perpetrators by signaling that crimes against lower castes will go unpunished . . . further disempower[ing] marginalized communities.³⁸

B. Urban India

Urban India, like many rapidly developing economies, is represented by a widening gap in economic inequality and the spread of "Western"

to jobs such as cleaning latrines and cremation sites, and whose very touch was said to defile members of superior castes. OLIVER MENDELSON & MARIKIA VICZANY, *THE UNTOUCHABLES: SUBORDINATION, POVERTY AND THE STATE IN MODERN INDIA* 3-4 (1998).

34. See Sundaram et al., *supra* note 19, at 152; see also Rahi Gaikwad, *Dalit Women at the Receiving End*, THE HINDU (Sept. 25, 2012), <http://www.thehindu.com/news/national/dalit-women-at-the-receiving-end/article3934877.ece>.

35. Sexual assaults along caste-lines have been referred to as hate crimes. Hate crimes are understood as "unlawful, violent, destructive, or threatening conduct in which the perpetrator is motivated by prejudice toward the victim's putative social group," but has little to do with personal animus against the victim as an individual. See Smriti Sharma, *Hate Crimes in India: An Economic Analysis of Violence and Atrocities Against Scheduled Castes and Scheduled Tribes* 6 (Ctr. for Development Economics, Working Paper No. 213, Dec. 2013), <http://www.cdedse.org/pdf/work213.pdf> (citing Donald Green et al., *Hate Crime: An Emergent Research Agenda*, 27 ANN. REV. SOC. 479, 480 (2001)). Hate crimes are typified by the underlying intention to victimize an individual because of her membership in a certain group. Evidence suggests that upper castes use and justify various forms of violence as tools to ensure adherence to caste-based norms and traditions by the lower castes. According to India's National Crime Records Bureau, three Dalit women are raped, two Dalits are murdered, and two Dalit homes are torched every day. Hilary Mayell, *India's "Untouchables" Face Violence, Discrimination*, NAT'L GEOGRAPHIC NEWS (June 2, 2003), http://news.nationalgeographic.com/news/2003/06/0602_030602_untouchables.html; see also Sundaram et al., *supra* note 19.

36. See Sundaram et al., *supra* note 19, at 150 ("Analyzing the justice of dalit rape victims in 2006, the official conviction rate for Dalit atrocity cases was just 5.3 percent. According to NCRB the average conviction rate for crimes against Scheduled Castes and Scheduled Tribes stood at 31.8% and 19.2% respectively as compared to overall conviction rate of 41.1% relating to IPC cases and 90.5% relating to SLL cases . . .") (citing National Crime Records Bureau, *Crime in India*, MINISTRY HOME AFF., GOV'T INDIA (2010), <http://ncrb.nic.in>).

37. See Sharma, *supra* note 35, at 17 ("Newspaper reports frequently find that judgment on cases is delayed by several years due to the lax performance of the courts and the apathetic attitude of the legal machinery.").

38. *Id.*

culture and erosion of "Indian" culture. In the urban landscape, perpetrators of sexual crime are unlike the upper-caste perpetrators of rural India. They are typically poor, illiterate, disenfranchised, and unemployed or underemployed young men. The impetus for sexual crime arguably comes from two fronts: (1) The perception of upwardly mobile women in urban settings and, to a much greater extent, and (2) the belief that perpetrators will not be apprehended. Tellingly, the leader of the group that sexually assaulted Jyoti Pandey, began with the statement "let's go out and have some fun."³⁹ In the Mumbai cases, the perpetrators "called two of their friends saying, 'Come, the *shikar* [or prey] has arrived.' After repeatedly raping the photojournalist, [the perpetrators] laughed at her and boasted, 'We are evil. We have raped many girls but no one has ever caught us.'"⁴⁰ Such statements suggest that increased accountability, or the belief that punishment is likely, would deter perpetrators of sexual crime in urban India, whose behavior stems from little more than a desire to "have some fun."

Most narratives conceptualize these behaviors as "sex crimes," "condemn[ing] the perpetrator as a deviant; similarly, psychology or existentialist philosophy never view the perpetrator as a normal person committing a deliberate act."⁴¹ However, in this context, the perpetrator *is* a normal person, and the act *is* a deliberate one. The impetus is social rather than psychological.⁴² The social context is one that warns that "any woman . . . whether married or unmarried, [who] goes along with a man, with or without her consent, should be hanged."⁴³ The victims in the Mumbai and

39. See Burke, *supra* note 2. In South Africa, known as the rape-capital of the world, gang rape is also called jackrolling and "[a]bout 25% of youth near Johannesburg described gang rape as recreational and fun." *South Africa's Rape Shock*, BBC NEWS (Jan. 19, 1999), <http://news.bbc.co.uk/2/hi/africa/258446.stm>.

40. Tejas Mehta & Saurabh Gupta, *Shakti Mills Gang-Rapes: 3 Convicts Sentenced to Death for Repeat Offense*, NDTV (Apr. 5, 2014), <http://www.ndtv.com/india-news/shakti-mills-gang-rapes-3-convicts-sentenced-to-death-for-repeat-offence-556191>.

41. Lozano, *supra* note 30, at 670.

42. Proponents of sex crimes as a modern concept argue that "the idea that a murder can be sexually motivated and give pleasure could only emerge under the influence of the enlightenment and the new understanding of the relationship between subject and object that arose from knowledge of scientific disciplines such as psychiatry, sexology, and criminology." *Id.* at 671. Contrast the notion of European/North American sex criminal with that of Brazilian rapist. "In contrast to their British counterparts, Brazilian perpetrators act under a moral duty that transcends them." *Id.* at 672. Perhaps like the Brazilian example, rape in India is reminiscent of a society straddling the boundary between tradition and modernity. In Brazil, "'bloody rape' [is explained] as an emerging characteristic of a transition period between a society governed by gender status and a modern society governed by contractual relationships in which women acquire equal rights as citizens, independent and free." *Id.* at 665. In the European cases of sexual violence against women, "the process leads to sexual gratification, and in Brazil, [like India] it produces feelings of equality with peers and asserts masculinity as protector and punisher." *Id.* at 674. See also *supra* note 27.

43. Abu Azmi Follows Mulayam Singh's Footsteps with "Sexist" Remark; Says "Women Having Premartial Sex Should Be Hanged," DAILY NEWS & ANALYSIS INDIA (Apr. 11, 2014), <http://www.dnaindia.com/india/report-abu-azmi-follows-mulayam-singh-s-footsteps-with-sexist-remark-says-women-having-premarital-sex-should-be-hanged-1977290>; *Women Who Have Sex Outside Marriage Should be Hanged: SP Leader Abu Azmi*, TIMES OF INDIA (Apr. 11, 2014), <http://timesofindia.indiatimes.com/india/Women-who-have-sex-outside-marriage->

Delhi cases were all young, unmarried women, with a male companion. The perpetrators could be described as “normal”: They were all men with families—several of them were husbands and fathers, while the youngest lived with parents or grandparents.⁴⁴ The similarities between the victims in each case is noteworthy. Why was Pandey a target in Delhi? Why were the photojournalist or the call center employee targeted in Mumbai? In each instance the victims were young women in the urban workforce who happened to be alone in the company of a man when they were attacked.⁴⁵

Economic inequality exacerbates crime.⁴⁶ In India, economic differences are further exacerbated by the cultural norms that accompany them. In the sexual crimes previously described, the victims represented a modern culture in which women were educated, independent, wage-earning, and upwardly mobile members of society. One of the Shakti Mills victims was an intern with an English language magazine.⁴⁷ Another worked at a private firm as a call-center operator. Jyoti Pandey was a physiotherapy student. The perpetrators, on the other hand, were described as unemployed school dropouts known for petty thefts, used to abusing alcohol and loitering at abandoned buildings.

The attitude of the perpetrators in Jyoti Pandey’s case suggests that the long-surviving myth that victims provoke rape through their actions and dress is at play in urban sexual crime. Pandey happened to be dressed in non-Indian clothing—i.e. jeans and high-heels, which are non-traditional for Indian women, though far from the exception in modern, urban Delhi—accompanied by a male friend, at a late hour in the evening. These circumstances may have suggested to the rapists that she was morally deserving of their violent “punishment,” more so than if she had been adorned in traditional Indian clothing, and found in the company of her family or female companions. Indeed, the responses to Pandey’s rape and torture suggest that a shift in perception of the victim might have saved her

should-be-hanged-SP-leader-Abu-Azmi/articleshow/33599253.cms. Abu Azmi is the head of the “Samajwadi Party (SP),” an Indian political party.

44. One of the perpetrators in the Mumbai rape case was married with children and told his wife he had a proper job. However, the police say he committed petty thefts. Another perpetrator lived in a “chawl” or old working class tenement until his family was evicted to the street. A third lived with his eighty-year old grandmother who sold vegetables on the street for subsistence. Two more of the perpetrators were minors with spotty school attendance. Hakim, *supra* note 3; V. Narayan, *Mumbai Gang Rape Accused Says Gang Has Done It Before*, TIMES OF INDIA (Aug. 26, 2013), <http://timesofindia.indiatimes.com/india/Mumbai-gang-rape-accused-says-gang-has-done-it-before/articleshow/22056571.cms>.

45. The photojournalist was raped while she was on an assignment at the Shakti Mills compound on August 22, 2013. Ansari, Bangali, Khan, Jadhav, and a minor raped her after tying her colleague to a tree. Later, they forced her to clean the spot before allowing the two to leave. *Gangrape Accused Say They Also Raped Four Ragpickers in the Same Mumbai Mill*, INDIA TODAY (Aug. 26, 2013), <http://indiatoday.intoday.in/story/mumbai-gangrape-accused-history-of-rapes-in-shakti-mill-forced-photojournalist-to-clean-spot/1/301372.html>.

46. See, e.g., Pablo Fajnzylber, Daniel Lederman & Norman Loayza, *Inequality and Violent Crime*, 45 J.L. & ECON. 1 (2002) (concluding, based on empirical data analysis, that there is a positive and significant correlation between inequality and crime rates).

47. Mehta & Gupta, *supra* note 40.

from her attackers.⁴⁸ A.P. Singh, defense counsel for two of the men convicted of the crime, remarked that he would have burnt his daughter alive had she been “having premarital sex and going around at night with her boyfriend.”⁴⁹ This controversial statement implies that Pandey was deserving of her fate. After all, she was unmarried and was on her way home from watching a movie at the mall with a young man. Self-proclaimed religious guru, Shri Asaram Bapu was quoted saying, “The victim is as guilty as her rapists . . . She should have called the culprits brothers and begged before them to stop . . . This could have saved her dignity and life. Can one hand clap? I don’t think so.”⁵⁰

While the dichotomy of impoverished criminal and upwardly mobile victim is not unique to urban India, its effects in the context of sexual crime are undeniable, particularly when there appears to be little or no effort to stem the tide. Naturally, laws are more deterrent when they are seen as strongly enforced. Here, the law can have two primary effects on behavior: It can change people’s conduct by penalizing certain actions (i.e. under deterrence theory), but it can also change beliefs people have about the conduct itself (i.e. under normative theory).⁵¹ Deterrence and normative theory are thus connected.

[U]nder the normative model, people obey the law only when they see it as truly legitimate and reflective of societal norms. People are deterred from committing a crime either because they ‘believe that the law is morally right and they seek to engage in moral behavior,’ or because they ‘believe that they should follow any law that is created by a legitimate authority.’⁵²

Impunity for sexual crimes against women is often cited as a reason for escalating violence.⁵³ The notion of impunity has historic links to gender violence and sex crimes rhetoric. It has been defined as “the impossibility, de jure or de facto, of bringing the perpetrators of violations to account—

48. See JUSTICE VERMA REPORT, *supra* note 7, at 11.

49. *Delhi Gangrape Case: Defence Lawyer Stokes Controversy*, INDIAN EXPRESS (Sept. 14, 2013), <http://archive.indianexpress.com/news/delhi-gangrape-case-defence-lawyer-stokes-controversy/1169243/>.

50. See JUSTICE VERMA REPORT, *supra* note 7, at 11.

51. See Deborah Zalesne, *Sexual Harassment Law in the United States and South Africa: Facilitating the Transition from Legal Standards to Social Norms*, 25 HARV. WOMEN’S L.J. 143, 185 (2002).

52. *Id.* at 187.

53. For example, in Guatemala,

impunity for the battering and killing of women is at such levels that perpetrators rightly feel confident that there is no price to pay for their unrestrained violence. Each year the number of women murdered rises precipitously, and there is general consensus that the impunity enjoyed by those responsible is a significant factor in the escalating numbers of killings in Guatemala.

Karen Musalo, et al., *Crimes Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN’S L.J. 161, 161-62 (2010) (citations omitted).

whether in criminal, civil, administrative or disciplinary proceedings—since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.”⁵⁴ The term “impunity,” which first developed in Latin America, has come to be something of a term of art in the context of sexual crimes. Historically, it encompassed the non-prosecution of war crimes and other crimes against humanity, which include sexual crimes against women. Now the term is used around the world to “refer[] to the lack of legal consequences for grave crimes and human rights violations.”⁵⁵

Fast track courts are an effective deterrent for perpetrators who are otherwise shielded by strong powerful cultural norms and traditionalist attitudes. These courts combat both the fact and fiction that sexual crime will go unpunished. As such, these courts focus primarily on punishment as a form of deterrence, while simultaneously (but slowly) eroding normative constructs that undermine deterrence.

C. Group Sexual Assault

Group sexual assault or gang rape⁵⁶ is particularly susceptible to deterrence theory because ostensibly, a single dissenter can prevent the commission of the crime in a group context. Gang rape socializes the character of sexual crime, making it a communal activity. As the Mumbai and Delhi cases reveal, it can become a ritual of “male bonding,” undertaken for the enjoyment and entertainment of several, rather than the act of one bad or evil character inflicted out of cruelty or mental depravity.

Social psychologists who analyze the behavior and mindset involved in gang rape posit that the diffusion of responsibility, deindividuation, and modeling of aggression are what spurs individuals into such aggressive behavior.⁵⁷ The presence of others acting in a similar manner diminishes feelings of individual blame and responsibility that might have deterred a single offender acting alone.⁵⁸ Indeed, the group setting can actually cause

54. Independent Expert to Update the Set of Principles to Combat Impunity, *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* 6, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) (by Diana Orentlicher).

55. See Mykola Sorochinsky, *Prosecuting Torturers, Protecting "Child Molesters": Toward a Power Balance Model of Criminal Process for International Human Rights Law*, 31 MICH. J. INT'L L. 157, 183, 229, n.19 (2009) (citations omitted) (defining impunity as “a state of affairs in which individuals who have committed serious human rights violations and international crimes (often state security forces) are shielded from prosecution, either by formal legal rules, such as one-sided amnesties, or by systemic failures of national criminal justice systems to bring them to justice.”).

56. Section 376 of the Indian Penal Code modifies the definition of “rape” by changing the reference to sexual assault, which encompasses broader acts than “rape,” which is defined in Section 375 in terms of “penetrative sexual intercourse.” See PEN. CODE § 375-76 (2010) (India); see also JUSTICE VERMA REPORT, *supra* note 7, at 83 (“[R]ape is a form of sexual assault.”).

57. Kimberley Allen, *Guilt by (More Than) Association: The Case for Spectator Liability in Gang Rapes*, 99 GEO. L.J. 837, 850 (2011).

58. *Id.*

an individual to feel a sense of belonging, because by acting as part of a collective, the person conforms to a group identity and therefore experiences the “rapport, fellowship and cooperation with co-offenders.”⁵⁹ Lastly, the group setting allows an individual to temporarily lose self-awareness of his beliefs, morals, and standards.⁶⁰ In sum, “Gang rape is inherently a group activity and ‘a vehicle for interacting with the other men’—it is not merely ‘a series of single rapes on one victim in close temporal and spatial relationship to each other.’”⁶¹

Rape is often a means of demonstrating strength and virulence—particularly when few other means exist—and of relating to other men. For that purpose, “having an audience is critical.”⁶² In fact, most gang rapes involve an instigator and followers.⁶³ Sociologists posit that the

impulse to bond with the male group becomes a kind of perverse inflaming energy inciting to rape. Lust is only a subsidiary drive . . . The rape is proof of commitment to the unit’s fierceness. A young man willing to do hideous things has subordinated his individual conscience in order to fuse with the uncompromising purpose of the group. A man seals his allegiance in atrocity.⁶⁴

Notably, the gang rape of Jyoti Pandey was orchestrated by underemployed, impoverished slum-dwellers who lived on the fringes of Delhi society and had nowhere to go but down. Other than their abject poverty, the rapists in Pandey’s case were unexceptional. Their proclivity for sexual crime therefore cannot be attributed to any exceptional circumstance, and was born of nothing more than substance abuse and a penchant for “illicit fun.” Some have likened this sentiment to American teenagers who

get drunk and go get sex in the same way that they get high and go to the 7-11 to shoplift candybars. They know it is wrong, but it is not *that* bad. Most adolescents do not get drunk and go rob banks. They do not get drunk and commit murder. They do get drunk and break little rules. They shoplift and joyride and vandalize. The rule against raping . . . is like the rule against shoplifting—it is a little rule.⁶⁵

59. *Id.* at 848 (citing A. NICHOLAS GROTH & H. JEAN BIRNBAUM, *MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER* 115 (1979)).

60. *Id.*

61. *Id.* (citations omitted).

62. Baker, *supra* note 27, at 606.

63. *Id.* at 608.

64. Valorie K. Vojdik, *Sexual Violence Against Men and Women in War: A Masculinities Approach*, 14 NEV. L.J. 923, 944 (2014) (citing Megan Gerecke, *Explaining Sexual Violence in Conflict Situations: Preliminary Findings for Bosnia and Herzegovina, Rwanda and Sierra Leone* 52 (Feb, 15, 2009) (unpublished manuscript)).

65. Baker, *supra* note 27, at 604-05.

Furthermore, given the unique psychological and social trappings surrounding gang rape, deterrence can prove particularly powerful in reducing incidents of gang rape. Following Jyoti Pandey's death, the Indian Parliament, acting on the recommendation of the Justice Verma Commission, expanded the criminalization of behavior relating to sexual assault, such as the disobedience of the law by a public servant in failing to record or investigate a report, and increased sentences.⁶⁶ The Indian Penal Code on group sexual assault criminalizes the following: "Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section."⁶⁷

D. *Potential for Normative Change*

Sexual violence against women, whether carried out by individuals or by a group, is also susceptible to normative deterrence. As previously discussed, the high incidence of violent rape in India is a reflection of cultural and social norms that accept gender inequality and even encourage such behavior. Historically, India is a highly male-dominated and patriarchal society where women have limited power over their own lives.

Fast-track courts have the potential to deter sexual crime by influencing normative change. While the existence of a law or system of enforcement alone is not enough for deterrence or normative change, a new law or enforcement system may "signal the existence of a national consensus denouncing the regulated behavior, thereby helping to create a societal norm."⁶⁸ As a corollary, when a law lacks enforcement power, it does not serve its purpose. Although India has some of the most comprehensive protections for women in its legislation, implementation and enforcement remain severely lacking.

The Dowry Prohibition Act of 1961 was the first law to address violence against women, and did so in general terms. The Act was spurred by the increasing number of "dowry deaths" of young brides, relating to the demand for property, money or other security paid by her family to that of her husband's upon marriage.⁶⁹ The Act "provided a penalty of

66. For a comparison between the Criminal Law (Amendment) Bill, 2012 and Ordinance of 2013 with the Justice Verma Report's Recommendations, see *Comparison between the Criminal Law (Amendment) Bill, 2012; the Report of the Committee on the Amendment to Criminal Laws; and the Criminal Law (Amendment) Ordinance, 2013*, PRS LEGISLATIVE RESEARCH (Feb. 6, 2013), <http://www.prsindia.org/administrator/uploads/media/Criminal%20Law/Comparison%20of%20Criminal%20Laws.pdf>.

67. PEN. CODE § 376, Explanation 1 (2010) (India). The Justice Verma Report had proposed gender-neutral language, a sentence ranging from 20 years of imprisonment for group sexual assault to a term of life imprisonment where group sexual assault resulted in the victim's death or vegetative incapacitation. However, the final iteration contained general sentence range of 10 years to life imprisonment. See Criminal Law (Amendment) Act, 2013, ¶ 9 (amending PEN. CODE § 376 (2010) (India)).

68. Zalesne, *supra* note 51, at 186.

69. See Sujata Gadkar-Wilcox, *Intersectionality and the Under-Enforcement of Domestic*

imprisonment for a minimum of six months and a maximum of two years for demanding a dowry.”⁷⁰ The Act was amended twice in what is colloquially called the “Anti-Dowry Statutes” in 1983 and 1986 and “required police and local magistrates to investigate suspicious deaths of brides after marriage.”⁷¹ In “1983, the Indian government, for the first time, recognized domestic violence as a specific category of crime through the introduction of section 498A into the Indian Penal Code,” known colloquially as “the Anti-Cruelty Statute.”⁷² The 1986 amendment revised the Indian Penal Code through the passage of section 304B “to require a minimum imprisonment of seven years and a maximum sentence of life imprisonment for those involved in dowry deaths,” and is known colloquially as the “Dowry Death” statute.⁷³

More recently, in 2005, the government passed the Protection of Women from Domestic Violence Act (PWDVA).⁷⁴ The government initiative also convened several bodies to enforce legislation protecting women from violence. For example, “the National Commission on Women was created by the National Commission for Women Act of 1990 (NCWA) and was set up as a statutory body in January 1992.”⁷⁵ The National Human Rights Commission was created “in the context of a public outcry over rapes, tortures, and murders by police officers acting under the sweeping power of Indian antiterrorist legislation in the 1980s,” with “an extremely broad mandate to investigate human rights violations and suggest remedies to the central government.”⁷⁶

Despite the sizeable collection of legislation designed to protect women from gender violence, such violence has grown rampant in the country. In addition to the existing socio-cultural attitudes towards women which resist legal reform, some critics, including the Justice Verma Committee and the High Level Committee on Status of Women in India, (established by the central government in May 2013), have cited the failure of police compliance with the legislative mandates and the complexity and imprecision of the laws as the reasons for their inefficacy.⁷⁷

Violence Laws in India, 15 U. PA. J.L. & SOC. CHANGE 455, 459 (2012).

70. *Id.* at 460 (citation omitted).

71. *Id.*; see also Judith Greenberg, *Criminalizing Dowry Death: The Indian Experience*, 11 AM. U.J. GENDER SOC. POL’Y & L. 801, 807 (2002)).

72. See Greenberg, *supra* note 71, at 807..

73. *Id.* at 808 (citing Indian Penal Code Act, No. 45 of 1860, PEN. CODE § 304B(2) (India)).

74. See Gadkar-Wilcox, *supra* note 69, at 458-59 (citing The Protection of Women from Domestic Violence Act, No. 43 of 2005, INDIA CODE (2005), vol. 12).

75. *Id.* at 461.

76. *Id.*

77. HIGH LEVEL COMM. ON THE STATUS OF WOMEN, EXECUTIVE SUMMARY: REPORT ON THE STATUS OF WOMEN IN INDIA 12 (2015), http://wcd.nic.in/sites/default/files/Executive%20Summary_HLC.pdf (observing that despite the existence of laws “passed to [sic] improve the status of women and to empower them . . . gender based violence” continues in part due to “inadequate implementation of laws by the State, police and courts.”); JUSTICE VERMA REPORT *supra* note 7, at iii, 51, 151 (calling for “simple procedural protocols [to be] put in place,” and asserting that the erosion of the rule of law is caused by the lack of “quality of the police force,” and “fundamental attitudes towards women,” amongst others things, and “not the want of needed legislation.”). See also LAW COMM’N OF INDIA, ONE HUNDRED AND

Rape laws protecting women from violence have encountered ongoing resistance to their enforcement,⁷⁸ primarily in the form of victim blaming,⁷⁹ such as when a woman dresses provocatively or is out at night or in the company of other men. As Martha Nussbaum observed, rape in India “has been badly dealt with under the law for many years, and the number of rapes appears to be on the rise.”⁸⁰ Moreover, “it is easy to find cases in which acquittal was secured on the grounds that the woman was of low caste, or ‘immodest,’ even when there is ample evidence of forcible rape in the particular instance.”⁸¹

In line with these opinions on the safety of women, the response by village leaders in parts of rural India has been to tighten the reins on gender governance. For example, in the village of Khedar in the state of Haryana, the village leaders decided to “ban ‘vulgar songs’ at weddings, prohibit women from wearing jeans and T-shirts, and stop girls from carrying mobile phones to school.”⁸² Such decisions reveal that Pandey’s death did not trigger calls for gender equality so much as stricter “protections” and more drastic measures to ensure the safety of India’s “fairer sex” — often a rejection of so-called “Western” influences or modern trends.⁸³ In an interview, the wife of one of the men convicted of Pandey’s rape said “she doesn’t understand how a woman could be out for the evening with a man who wasn’t her husband.”⁸⁴ Even during the brutal attack on Pandey and her companion, the attackers paused to ask why Pandey was out with a man in the evening, implying that there was something improper about the situation.⁸⁵

Sexual assault trials, where the victim survives or where the violence was not as extreme as the case of Jyoti Pandey, are dealt with very differently in the Indian legal system. Take for example the case involving a teenage tribal girl who was raped by two police officers at a police station

SEVENTY-SECOND REPORT ON REVIEW OF RAPE LAWS (2000), <http://www.lawcommissionofindia.nic.in/rapelaws.htm>; Jennifer Bays Beinart, Note, *Beyond Trafficking and Sexual Exploitation: Protecting India's Children from Inter and Intra-familial Sexual Abuse*, 21 IND. INT'L & COMP. L. REV. 47, 56 (2011) (The Indian Penal Code “has been described by some as archaic and sexist.”) (citing PINKI VIRANI, BITTER CHOCOLATE: CHILD SEXUAL ABUSE IN INDIA (2000)); Olga Khazan & Rama Lakshmi, *10 Reasons Why India Has a Sexual Violence Problem*, WASH. POST (Dec. 29, 2012), <https://www.washingtonpost.com/news/worldviews/wp/2012/12/29/india-rape-victim-dies-sexual-violence-proble/>.

78. See *id.* at 457 (“Despite progressive legal reforms, statutes addressing dowry violence and spousal abuse remain unenforced for the majority of rural and lower caste women because these women cannot overcome the combined effects of deep-seated presumptions about both their gender and class status.”) (citation omitted).

79. See Martha C. Nussbaum, *Sex, Laws, and Inequality: What India Can Teach the United States*, DAEDALUS: J. OF THE AM. ACAD. OF ARTS & SCI. 95, 101-02 (2002).

80. *Id.* at 101.

81. *Id.*

82. In *India's Villages, Delhi Rape Spurs Restrictions*, NDTV (Jan. 9, 2013), <http://www.ndtv.com/article/india/in-india-s-villages-delhi-rape-spurs-restrictions-315010>.

83. See *id.*

84. Krishna Pokharel & Aditi Malhotra, *In India, Rapist's Wife Faces Harsh Judge: Tradition*, WALL ST. J. (Sept. 23, 2013), <http://online.wsj.com/news/articles/SB10001424127887324665604579081240828710138>.

85. *Id.*

in rural Maharashtra, but lived to tell the tale.⁸⁶ The court acquitted the policemen because the young woman was not a virgin prior to the rape and therefore consent was presumed.⁸⁷ The appeals court reversed after finding that consent and passive submission were not the same.⁸⁸ However, the Indian Supreme Court upheld the original acquittal because there were no marks of physical injury on the victim.⁸⁹ Following the public outcry at the decision, the Indian Penal Code was reformed to include the crime of custodial rape for the first time, and also to clarify that the notion of consent was read to mean actual consent.⁹⁰

In the criminal justice context, normative change—aspiring to change societal norms to conform to an ideal—has been a recurring element, particularly in “hate” crimes that involve an element of bias and are motivated by differences in immutable traits such as race, gender, or sexual orientation.⁹¹ Normative change has also been a focus of transitional justice systems in jurisdictions that are newly-created democracies. For instance, in the aftermath of the Rwandan genocide, the International Criminal Tribunal for Rwanda explained that imposing particularly severe penalties on a key leader would deter others “by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights.”⁹²

In both the bias-crime context and in transitional justice systems, normative change appears most dependent on punishment. As discussed in the following section, punishing the perpetrator has historically also been a focus of normative change in the Indian justice system. However, this article posits that the procedure and operations of the system have equal normative value to the punishment itself.

This is particularly true because in the Indian context, the normative change that is called for is not the condemnation of rape or sexual violence against women, but that of misogyny and sexist oppression, which are still widely condoned. Certainly, courts have limits to how much fundamental normative change they can influence. But in the Indian context, the courts are following, not veering from, the legislature, and therefore should be unhampered in their role as unelected public servants.

86. Tuka Ram And Anr. v. State Of Maharashtra, A.I.R. 1979 S.C. 185 (1978) (India).

87. *Id.*

88. *Id.*

89. *Id.*

90. Shalini Ghosh, *The Treatment of Sexual Violence in India*, 3 WARWICK STUDENT L. REV. 41, 45 (2013).

91. Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 320-21 (1994) (distinguishing between crimes committed with a “bias motive” from those that are not). “Implicit within every penal relation and every exercise of penal power there is a conception of social authority, of the (criminal) person, and of the nature of the community or social order that punishment protects and tries to re-create.” *Id.* (citing DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 265 (1990)).

92. Prosecutor v. Rutaganda, Case No. ICTR 96-3-T, Judgment and Sentence, ¶ 456 (Dec. 6, 1999).

II. EVOLUTION OF FAST-TRACK COURTS

The apex of the Indian judicial system is the Supreme Court, composed of thirty Justices and one Chief Justice.⁹³ Article 32 of the Indian Constitution confers broad original jurisdiction including the “power to direct transfer of any civil or criminal case from one State High Court to another State High Court or from a Court subordinate to another State High Court.”⁹⁴ As the final court of appeal, it hears appeals primarily from the decisions of the High Courts. The High Courts are constitutional courts established under Article 214 of the Indian Constitution by each of the states and union territories that comprise the Indian federation.⁹⁵ High Court judges are appointed by the President of India in conjunction with the Chief Justice and state governor.⁹⁶ Subordinate to the High Courts are District Courts, established by each state for each district or group of districts within that state, depending on the number of cases and population distribution.⁹⁷ These courts are presided over by a District or Sessions Judge depending on whether the case is civil or criminal, respectively.⁹⁸

Fast-track courts, a recent counterpart of the District Courts, have existed in some form since the early 2000s. At the behest of former Law Minister, Arun Jaitley, the Eleventh Finance Commission of India appropriated funds for the creation of 1,734 “fast-track” courts to reduce the severe backlog of pending cases caused by the low judge-to-population ratio.⁹⁹ The central government granted these funds to the individual states to establish the fast-track court system.¹⁰⁰ At first, these courts of general

93. *Constitution*, SUPREME COURT OF INDIA (2014), <http://supremecourtindia.nic.in/constitution.htm>.

94. *Jurisdiction of the Supreme Court of India*, SUPREME COURT OF INDIA (2014), <http://supremecourtindia.nic.in/jurisdiction.htm>.

95. INDIA CONST. art. 214; *see also Constitution*, SUPREME COURT OF INDIA (2014), <http://supremecourtindia.nic.in/constitution.htm>; *Judiciary of India*, MAPS OF INDIA (Jan. 9, 2015), <http://www.mapsofindia.com/government-of-india/judiciary/>.

96. *Judiciary of India*, MAPS OF INDIA (Jan. 9, 2015), <http://www.mapsofindia.com/government-of-india/judiciary/>.

97. *See, e.g., District Court of Haridwar*, DISTRICT COURTS OF INDIA (Aug. 2, 2016), <http://ecourts.gov.in/haridwar> (providing information about the District Court of Haridwar); *see also District Courts*, INDIA COURTS, <http://indiancourts.nic.in/districtcourt.html>; *Judiciary of India*, MAPS OF INDIA (Jan. 9, 2015), <http://www.mapsofindia.com/government-of-india/judiciary/>.

98. *Id.*

99. *1,800 Fast-Track Courts on Anvil to Speed Up Justice*, TIMES OF INDIA (Aug. 23, 2014), <http://timesofindia.indiatimes.com/india/1800-fast-track-courts-on-anvil-to-speed-up-justice/articleshow/40725609.cms>.

100. Ram Mashru, *Justice Delayed is Justice Denied: India's 30 Million Case Judicial Backlog*, THE DIPLOMAT (Dec. 25, 2013), <http://thediplomat.com/2013/12/justice-delayed-is-justice-denied-indias-30-million-case-judicial-backlog/>; *see also* Dean Nelson, *Delhi Gang Rape: Case Backlog To Blame for Increase in Assaults Says Chief Justice*, THE TELEGRAPH (Jan. 8, 2013), <http://www.telegraph.co.uk/news/worldnews/asia/india/9788066/Delhi-gang-rape-case-backlog-to-blame-for-increase-in-assaults-says-chief-justice.html>; *World's Largest Backlog of cases: PM*, INDIAN EXPRESS (Aug. 17, 2009), <http://www.newindianexpress.com/nation/article70635.ece> (“As per official figures, there were 52,592 cases pending before

subject matter jurisdiction were not thematically focused.¹⁰¹ They were designed primarily to counter the increasingly large number of criminal defendants or “undertrials” who were in state custody. By accelerating the timeline, the fast-track courts saved the government money by reducing the amount of time criminal defendants spent in state custody and also ensured their constitutional right to a speedy trial.¹⁰² Several such courts were established and staffed by the controversial appointment of ad hoc and retired judges who were meant to serve a temporary two-year fixed term.¹⁰³ The government renewed the fast-track scheme in 2005. However, the courts were abruptly dissolved in 2011/2012 when central government funding dried up and individual states refused to take on the exclusive financial responsibility.¹⁰⁴

The creation of these courts faced constitutional challenges. In a landmark decision, the Supreme Court upheld the courts and gave itself the power to (1) appoint judges to staff the new courts, and (2) oversee the corresponding budgetary allocations.¹⁰⁵ One element of the constitutional challenge was the accountability of the newly appointed fast-track judges

the Supreme Court, an aggregate of 40,17956 cases pending before the High Court and 2,71,19,092 cases pending before all the subordinate courts put together as on June 30, 2009. Inaugurating the Chief Ministers' and Chief Justices' Conference here Singh said, 'I am told that almost 3000 judges' posts in the country are vacant because of delay in recruitment.'").

101. However, following widespread religious and communal riots in the state of Gujarat in 2001, the government revamped the fast-track courts with a subject-specific agenda, namely to adjudicate the large number of cases resulting from communal violence. This was the first instance of combining the “fast-track” framework with a specialized subject matter. See Ratna Kapur, *Normalizing Violence: Transitional Justice and the Gujarat Riots*, 15 COLUM. J. GENDER & L. 885, 898 (2006).

102. See Mala Das, *Delhi High Court Clears Five Fast-Track Courts for Daily Hearing of Rape Cases*, NDTV (Dec. 24, 2012), <http://www.ndtv.com/article/cheat-sheet/delhi-high-court-clears-five-fast-track-courts-for-daily-hearing-of-rape-cases-309399>; Prafulla Marpakawar, *Maharashtra Sets Up 25 Fast-Track Courts*, TIMES OF INDIA (Dec. 26, 2012), <http://timesofindia.indiatimes.com/india/Maharashtra-sets-up-25-fast-track-courts/articleshow/17761047.cms?referral=PM>.

103. Madabhushi Sridhar, *Miscarriage of Fast Track Justice*, LAW GRATIS (Feb. 6, 2016), <http://www.lawgratis.com/2016/02/06/miscarriage-of-fast-track-justice/>.

104. See *Fast Track Courts*, DEP'T OF JUSTICE, <http://doj.gov.in/other-programmes/fast-track-courts> (last visited July 13, 2016) (showing the breakdown of funding for each year between 2005 and 2011); see also *Brij Mohan Lal v. Union of India & Ors.*, (2012) 5 S.C.R. 305 (India) (holding that the central government may cease funding and require states to shoulder exclusive financial burden for the continuation of fast-track courts); Sridhar, *supra* note 103; *Despite 1,000 Fast Track Courts, 32 Million Cases Still Pending*, THE NEW INDIAN EXPRESS (Dec. 23, 2013), <http://www.newindianexpress.com/nation/Despite-1000-Fast-Track-Courts-32-Millions-Cases-Still-Pending/2013/12/23/article1961278.ece> (“The government discontinued the fast-track courts scheme on March 31, 2011, after running it for over 11 years . . . A total of 701 fast track courts are working under the funds released by state governments, while 183 courts are functioning in Bihar and 100 courts are working in Maharashtra (till Dec, 2012), law ministry said . . . The Supreme Court upheld April 19, 2012, the government's policy to stop funding fast-track courts, which were created a decade ago to speed up trial in pending cases.”).

105. *Brij Mohan Lal v. Union of India & Ors.*, (2012) 5 S.C.R. 305 (India). Here, the judiciary was criticized for usurping the powers of the legislature in attempting to manage the budget for the creation and staffing of new courts because the appointment of judges to the fast-track courts was to be done by judges themselves.

who would be operating under contract for a fixed two-year term. These judges were effectively shielded from oversight and overlooked for any sort of promotion or tenure. The fast-track courts' ability to render speedy justice was questioned in light of the failure of many of their presiding judges to clear their dockets prior to retirement. Questions about the consistency and precedential value of fast-track court decisions were also raised in light of judges' temporary status. Moreover, critics questioned the central government's decision to allocate substantial funding for a temporary scheme rather than address the problem of severe case backlogs and the low judge-to-population ratio on a more permanent basis.¹⁰⁶

Despite these legal challenges, the Indian Supreme Court upheld the constitutional mandate to achieve speedy justice because of the deplorable conditions of India's overcrowded prisons. That landmark decision came in the aftermath of widespread public outcry and media attention focused on prison conditions and lengthy delays in criminal trials. An immediate benefit of the fast-track scheme was the reduction of maintenance costs associated with the number of undertrials languishing in jails across the country as the justice system slowly plodded along.¹⁰⁷ As such, the fast-track system focused on the rights of defendants and on reducing dockets, not on criminal justice doctrines of deterrence and normative change. Nevertheless, the national media reported in 2002, that the fast-track courts were impacting crime: "[T]he number of heinous crimes had come down, particularly in Rajasthan and Maharashtra," two of India's largest states.¹⁰⁸

The specialization of India's fast-track courts by limiting their jurisdiction to crimes of sexual violence against women is new.¹⁰⁹ However,

106. "The NDA government hesitated to address this issue on [a] regular and permanent basis and to spend Rs 4750 crore on revamping the existing judiciary by raising judge-population ratio, instead, it has put forward a 502 crore fast track court scheme for a period of five years, which is an ad hoc, half baked attempt to address a serious problem of baffling pendency. The scheme proposed to start 1750 fast track courts at the rate of five in each district to clear pending criminal cases." Sridhar, *supra* note at 103. However, one data aggregator counters that "[e]ven if the states have to . . . bear the entire expenditure [for fast-track courts in the absence of funding from the central government,] the fund requirement is less than 0.01% of the budget of most states." Rakesh Dubbudu, *Fast Track Courts Might Help Reduce Pendency in Courts – But Are the Governments Interested?*, FACTLY (Oct. 12, 2015), <https://factly.in/fast-track-courts-in-india-might-help-reduce-pendency-in-courts-but-are-the-governments-interested/>.

107. "There were over 1.2 million under-trials in the country and they were costing the state Rs.240 crores a year for even the basic amenities they received." *Justice on Faster Track*, GOODNEWSINDIA (June 9, 2003), <http://www.goodnewsindia.com/index.php/Supplement/article/justice-on-faster-track/>.

108. *Id.*

109. There was a previous attempt to combine fast-track procedures with specialized subject matter in 2002. The government created fast-track courts to adjudicate the large number of cases resulting from communal violence following widespread religious and communal riots in the state of Gujarat, which met with poor results. *See e.g.*, Kapur, *supra* note 101, at 898 ("Several mechanisms have been set up to try and secure justice for the Muslims and specifically the women who experienced horrific violence during the Gujarat riots. The primary mechanism established to inquire into the Godhra incident and Gujarat riots, is the 'fast track' court. The clear emphasis is on prosecution and conviction of those involved in the violence and to demonstrate in the most visible way that action is being taken by the State. However, in one of the first cases to be decided by the court, *The Best Bakery Case*, which arose

because their genesis came in the aftermath of a national crisis of faith with respect to sexual crime, this latest iteration of fast-track courts has focused exclusively on punishing perpetrators, without great emphasis on the potential of influencing norms through process and operation. Following Pandey's death in December 2012, the fast-track courts, which had just become defunct, were hastily revived in Delhi and quickly cropped up in states across India, with a new injection of funds from the Central Government.¹¹⁰ Because these courts were established quickly and by recycling the existing framework and machinery of the previous era of fast-track courts, it appears that little thought has been given to their specialized subject matter, their day-to-day processes, rules, and operation.¹¹¹

III. NEW-ERA OF FAST-TRACK COURTS

Incentivized by central funding, state governments appointed fast-track judges—from candidates including the judges who presided over non-specialized fast-track courts in their earlier iteration that were eventually made redundant¹¹²—to try sexual crimes in the new generation of fast-track courts.¹¹³ The government set up seventy-three such courts across the country, alongside District and Sessions courts, to try cases of sexual violence after Jyoti Pandey's death.¹¹⁴ Six of these courts are in Delhi,

out of the killing of fourteen people on the nights of March 1 and 2, 2002, in a building named Best Bakery, the court acquitted all of the twenty-one accused. Many of the key eyewitnesses turned hostile, refusing to repeat testimony that they had previously given to the police for fear that they would be subjected to reprisals. Subsequently, the National Human Rights Commission (NHRC) successfully appealed to the Supreme Court to set aside the orders of acquittal and secure a retrial of the case outside of Gujarat." (citations omitted).

110. Rukimini, *supra* note 13.

111. See KOTHARI & RAVI, *supra* note 11, at 11 ("The current lacuna in the guidelines to be followed by the special fast track courts in Karnataka for speedy disposal of cases suggests that no thought has been given to the question of how these courts may function effectively. There has been no evolution in the conception of fast track courts since they were first established more than a decade ago.").

112. See *Written Answer to Unstarred Question No. 572 on Fast Track Courts*, 15th Lok Sabha (House of the People, Parliament of India) (Aug. 7, 2013), <http://164.100.47.192/Loksabha/Questions/QResult15.aspx?qref=145960&lsno=15> ("After the unfortunate incident of gang rape in Delhi in December 2012, the States have been requested to set up FTCs for trial of rape cases, inter-alia by utilizing 10% additional positions of Judges being created in the Subordinate Judiciary based on the judgment of the Supreme Court in Brij Mohan Lal case on 19th April 2012.") See also Brij Mohan Lal v. Union Of India & Ors., (2012) 5 S.C.R. 305, 337-40 (calling for a 10 percent increase in the number of judicial officers of each state, and discussing the criteria and procedure for "absorb[ing]" existing FTC judges into the "regular cadre" of judicial officers when staffing the newly created offices, with an arguably permanent or quasi-permanent status).

113. For example, the District Courts for Tis Hazari District in Delhi list Judge Ramesh Kumar, II as the judicial officer presiding over the jurisdiction "FTC (SEXUAL ASSAULT ON WOMAN)." See *Tis Hazari Court Judges (Central), Additional Sessions Judges, DISTRICT COURT OF TIS HAZARI CENTRAL & WEST DISTRICT*, <http://delhicourts.thc.nic.in/thc-c-judges.html> (last visited July 13, 2016).

114. "After the gruesome Delhi gang rape, the government set up 73 fast-track courts across the country to the [sic] try cases of sexual violence against women as per provisions

where Pandey was killed, and several more are in Mumbai.¹¹⁵ Appeals from the fast-track courts, like their District Court counterparts, fall under the appellate jurisdiction of the corresponding state High Court. The "fast-track" nature or increased efficiency of these courts is supplied by Criminal Law (Amendment) Act, 2013 or the "Anti-Rape Law" as it is commonly known, passed after the rape and death of Pandey. Amongst its most significant revisions is drastically reducing the time taken for the prosecuting of sex crimes.¹¹⁶ The law states that the trial proceedings will be conducted day-to-day without adjournment unless absolutely necessary, and, moreover, that a trial will be completed within two months after initiation, i.e. a charge sheet is filed.¹¹⁷

The cases involving Pandey, the young photojournalist, and call-center operator were some of the fastest tried in the Indian justice system, a fact that has not gone unnoticed.¹¹⁸ Last year, a fast-track court conviction of an Uber driver for raping a woman in a car "less than a year after the attack is being described by those involved in the case as unprecedented for the speed at which it delivered justice for the victim of a sexual assault in India."¹¹⁹ The fast-track courts are working in rural settings as well as urban ones: "A few years ago, a crime like this where the victims are Dalits in rural areas would never have been investigated, let alone reported in national and international media," said Ranjana Kumari, a prominent women's rights activist and director of the New Delhi Centre for Social Research.¹²⁰ "The fact that the accused from the powerful Yadav caste have been arrested and are sure to be punished is important."¹²¹ Dedicating judicial resources and creating specialized courts for cases involving sexual violence against women is thus a big step forward.

mentioned in the [Criminal Law (Amendment) Act, 2013]. These were among 1,800 fast-track courts the authorities plan to set up and run for three years, focusing on violent crimes and other serious offences against women, children and the elderly, as part of broader judicial reforms." Rashi Aditi Ghosh, *85% Rape Cases Still Awaiting Court Trials*, DAILY NEWS & ANALYSIS INDIA (June 16, 2014), <http://www.dnaindia.com/india/report-85-rape-cases-still-awaiting-court-trials-1995988>.

115. Marpakwar, *supra* note 102; *How fast are fast-track courts?*, LIVE MINT (Dec. 16, 2014), <http://www.livemint.com/Politics/n4Z5sllEn0TJ75ijlgDrYP/How-fast-are-fast-track-courts.html> ("In Delhi, six fast-track courts deal exclusively with cases of sexual assault.").

116. Utkarsh Anand, *SC Seeks Views on More Changes in CrPC to Fast-Track Rape Cases*, INDIAN EXPRESS (Sept. 5, 2013), <http://indianexpress.com/article/cities/latest-news/sc-seeks-views-on-more-changes-in-crpc-to-fast-track-rape-cases-2/>. The Bench of Justice says that the amendments are not adequate to speed up the process of justice in rape cases.

117. See Criminal Law (Amendment) Act, 2013.

118. "Among those present in the courtroom was Home Minister R R Patil, who said the verdict will act as 'major deterrent.' Patil said, 'It is heartening to see that the trial has been conducted within such a short span after the charge sheet was filed.'" Hakim, *supra* note 3.

119. Vibhuti Agarwal, *What the Uber Driver's Trial Taught Us About India's New Fast Track Courts*, WALL ST J. (Oct. 21, 2015), <http://blogs.wsj.com/indiarealtime/2015/10/21/what-the-uber-drivers-trial-taught-us-about-indias-new-fast-track-courts/>.

120. Mandakini Gahlot, *Despite Tougher Laws, India Can't Shake Rape Culture*, USA TODAY (June 14, 2014), <http://www.usatoday.com/story/news/world/2014/06/14/india-rape/10003071/>.

121. *Id.*

A. Focus on Deterrence Through Punishment

If the delay in prosecuting sexual violence against women has supposedly led to a surge in such crime, it follows that increasing the likelihood of prosecution would deter crime—perhaps to a greater degree than even the threat of a conviction.¹²²

Criminal justice systems are designed to serve myriad objectives.¹²³ The objectives can generally be classified into the following theoretical frameworks: (1) Desert, retribution or revenge, (2) Deterrence, (3) Rehabilitation, (4) Restorative justice, and (5) Condemnation or social solidarity.¹²⁴ The fast-track courts in India are premised on theories of retribution and deterrence, or more precisely a theory of general deterrence—also known as a utilitarian justification for punishment.¹²⁵ These theories focus on the perpetrator and society, respectively.¹²⁶

The emphasis is evident in the judiciary's sentencing language:

122. See Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 64 (2002) (observing that in terms of deterrence, "[t]he actual severity or certainty of punishment is less important than its perceived severity or certainty."); JUSTICE VERMA REPORT, *supra* note 7 at 320-21 ("Non-implementation has resulted in deprivation of the benefits which police reforms would bring to the protection of fundamental rights of ordinary people."); see also HUMAN RIGHTS WATCH, *BROKEN SYSTEM DYSFUNCTION, ABUSE, AND IMPUNITY IN THE INDIAN POLICE* (2009), <https://www.hrw.org/report/2009/08/04/broken-system/dysfunction-abuse-and-impunity-indian-police> ("Police in India frequently fail to register crime complaints, called First Information Reports (FIRs), and to investigate crimes" because of "pressure from political leaders to show a reduction in crime by registering fewer FIRs," insufficient personnel, and heavy workloads, with women and Dalit community members "bear[ing] the brunt of this neglect.").

123. Aukerman, *supra* note 122, at 42-43 ("[D]ifferent societies have different goals for criminal justice. Even within societies there are often fundamental disagreements about the purposes of domestic criminal justice. For example, in the United States, there is a debate about whether offenders should be punished in prisons or rehabilitated in half-way houses; whether or not harsh sanctions have an appreciable deterrent effect; and whether or not reconciliation programs can be attached effectively to prosecutions. Despite such disagreements, however, in the West the determination of individual culpability through prosecution is commonly regarded as necessary to redress criminal actions. The widely held faith in prosecution—whether the goal is punishment or deterrence, condemnation or rehabilitation—disguises disputes about the underlying purposes of criminal justice.").

124. *Id.* at 44.

125. *Id.* at 56-64. (Retribution is "more politely described in terms of combating [sic] impunity or bringing perpetrators to justice," while the word deterrence "is often used interchangeably with 'prevention.' In fact, deterrence is only one way to prevent crime. Under deterrence theory, potential offenders may still be *capable* of committing crimes (since they are not incapacitated) and may still desire to commit crimes (since they are not rehabilitated). But despite their capacity and desire, potential offenders are inhibited by the intimidation or terror of the law. There are two main types of deterrence: individual deterrence and general deterrence. Individual deterrence seeks to prevent future crime by setting sentences that are strict enough to ensure that a particular offender will not reoffend. General deterrence, on the other hand, attempts to prevent crime by inducing other citizens who might be tempted to commit crime to desist out of fear of the penalty. Notably, deterrence theory does not allow, much less require, the punishment of all who are guilty. Moreover, general deterrence does not even require punishment of all those who might be deterrable as individuals. If exemplary punishments adequately prevent future crime, they are sufficient.") (citations omitted).

126. JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 326 (1931) (citation omitted).

To give the lesser punishment for the [accused] would be to render the justice system of this country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformatory jargon.¹²⁷

In another instance the same court remarked that a "shockingly large number [of criminals] even go unpunished, thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility."¹²⁸

The theory of deterrence

assumes that the potential offender will undertake a two-part calculation, assessing both the gravity of the consequences and the likelihood of getting caught. This calculation is based not on the objective severity of sanctions or the real risk of apprehension, but on the potential offender's subjective assessment of these factors. Thus, the effectiveness of any deterrent depends on the potential offender's perception of possible sanctions, and on her assessment of her ability to evade law enforcement.¹²⁹

Prosecution is particularly important for those cases in which perpetrators may conclude that it is worth the risk of criminal penalties to engage in sexual assault because they know the likelihood of being caught and apprehended is remote.¹³⁰ "The actual severity or certainty of punishment is less important than its perceived severity or certainty."¹³¹ Therefore, mandating the death penalty in rape cases that result in the death of the victim (which is no real modification since murder has always triggered the potential for capital punishment), is not an adequate deterrent on its own.¹³² Instead, it seems that the likelihood of prosecution, *not* conviction or sentencing, is what would really reduce crime statistics.¹³³

The fact that the suspects in Pandey's case were easily found and

127. Mahesh S/O. Ram Narain Etc v. State of Madhya Pradesh, (1987) 2 S.C.R. 710 (India).

128. Dhananjay Chatterjee Alias Dhana v. State of W.B., (1994) 2 S.C.C. 220 (India).

129. Aukerman, *supra* note 122, at 64.

130. See *id.* ("Deterrence occurs . . . when people refrain from certain actions because they fear the possible consequences of those actions. . . . Deterrence also assumes that the potential offender will undertake a two-part calculation, assessing both the gravity of the consequences and the likelihood of getting caught. . . . the effectiveness of any deterrent depends on the potential offender's perception of possible sanctions, and on her assessment of her ability to evade law enforcement.")

131. *Id.*

132. Simon Bronitt & Ashutosh Misra, *Reforming Sexual Offences in India: Lessons in Human Rights and Comparative Law*, 2 GRIFFITH ASIA Q. 37, 41-42 (2014).

133. See Flavia Agnes, *Violence Against Women: Review of Recent Enactments*, in IN THE NAME OF JUSTICE: WOMEN AND LAW IN SOCIETY 81, 98 (Swapna Mukhopadhyay ed., 1998) ("If the purpose of the rape trial is to act as a deterrent, rather than a prolonged sentence of life imprisonment, a less severe sentence within a stipulated time limit would serve the purpose. While there are delays, the benefit of such delays is awarded to the accused as the sentence is reduced on this ground even when the conviction is upheld. This is adding insult to injury.")

apprehended by law enforcement, having made minimal efforts to hide or cover up their actions, lends support to the argument that prosecution is a more powerful deterrent than conviction. Given the Indian legal landscape at the time, their quick surrender suggests that they had so little fear of apprehension that they did not even bother to hide. The suspects' behavior in the aftermath of the crime demonstrates their belief that the laws they had broken would not be enforced. Indeed, Ram Singh, the alleged leader of the gang who attacked Pandey and her companion, quickly confessed and even produced evidence of the crime.¹³⁴ Singh's behavior aligns with the pervasive sexual violence in Delhi—which went unreported or received cursory mention in the metro pages of the local news.¹³⁵ His attitude towards sexual violence was further confirmed by a Delhi poll in which 40% of male participants said that sexual assault victims brought it upon themselves.¹³⁶ Before the creation of fast-track courts, charges were seldom filed and trials and guilty verdicts were even rarer.¹³⁷

While the deterrent power that comes with significant increases in efficiency and timely processing of cases appears obvious, the normative potential of dedicating specialized courts to address sexual violence has not been explored. Because the impunity that characterizes sexual violence in India has strong social and cultural roots, the deterrent impact of normative change should be part of the fast-track courts' mandate. To be effective, this Article argues that the fast-track courts must incorporate normative principles alongside theories of deterrence. The following section discusses avenues for fast-track courts to consciously influence normative change in Indian society.

B. *Specialization as an Instrument of Normative Change*

Arguably, the fast-track courts influence norms simply by existing because they demonstrate state action to address escalating sexual violence against women. Similarly, the passage of stronger legislation also influences norms over time. Combining stronger laws with more effective enforcement is more likely to destabilize the socio-cultural norms that generate sexual violence. However, normative change is notoriously sluggish and is even slower than the lamented pace of criminal trials. Moreover, the fast-track courts are not explicitly supported by national legislation, and normative change is not an explicit objective of the fast-track court system. Without a normative commitment, fast-track courts risk

134. Burke, *supra* note 2 ("Very quickly, Singh admitted his involvement in the attack, even producing two iron rods, covered in dry blood, from a compartment in the bus's cabin. By the end of the week, five of the six were in custody.").

135. *See id.*

136. NANDITA BHATLA, ET AL., INT'L CTR. FOR RESEARCH ON WOMEN, SAFE CITIES FREE FROM VIOLENCE AGAINST WOMEN AND GIRLS: BASELINE FINDING FROM THE "SAFE CITIES DELHI PROGRAMME" 10 (2013), <http://www.icrw.org/publications/safe-cities-free-violence-against-women-and-girls-baseline-finding-safe-cities-delhi-pr>.

137. *See* Burke, *supra* note 2.

perpetuating—within the very system designed to combat gender-based violence—the same harmful attitudes and norms that pervade society and cause sexual violence against women to begin with.

Although commentators have lauded the Indian High Courts and Supreme Court for their progressive stances towards women's rights, most of India's population only has access to the lower tier of the judiciary.¹³⁸ The lower tier courts, such as district and sub-district courts, have overwhelming dockets and inadequate staffing, and are both the first and last resort for most Indians.¹³⁹ When sexual assault cases are heard before judges in these courts, the results can be a mixed bag. Well-meaning jurists will attempt to rule, not according to the law and constitutional mandates, but rather in accordance with their perception of prevalent social norms.¹⁴⁰ In contrast, the specialized nature of fast-track courts allow judicial officers and court staff to gain expertise in adjudicating gender-based sexual crimes. The following example demonstrates the importance of training to avoid well-meaning adjudicators from making heavily biased decisions in sexual violence cases.

The Indian judiciary played a key role in the reform of the legal rule that required corroboration of a sexual assault victim's testimony. The basis for the judiciary's activism was the belief that

Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western World. It is wholly unnecessary to import the said concept on a turn-key basis and to transplate [sic] it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian Society, and its profile.¹⁴¹

In other words, it was inconceivable that an Indian woman would level a false accusation of sexual assault or rape because of the pervasive taboo of any topic dealing with sexuality in Indian society. In more detail, the court listed the many reasons why an Indian woman would be reluctant to bring a charge of sexual assault, much less fabricate a false one:

(1) A girl or a woman in the tradition bound non-permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being

138. See Jayanth K. Krishnan, et al., *Grappling at the Grassroots: Access to Justice in India's Lower Tier*, 27 HARV. HUM. RTS. J. 151, 153 (2014).

139. *Id.* at 165 (finding that the "lower tier is characterized by poor court infrastructure, heavily backlogged dockets, excessive continuances, and insufficient quantity of judges, and inadequate legal training"); see also *id.* at 181 (noting that "judges in the lower tier may be the primary protectors of [socioeconomically disadvantaged] claimants who bring forth social and economic grievances.").

140. See *id.* at 182.

141. JUSTICE VERMA REPORT, *supra* note 7, at 81 (citing *Bharwada Bhoginbhai Hirjibhai v. State Of Gujarat*, (1983) 3 S.C.R. 280 (India)).

ostracised by the Society or being looked down by the Society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance. With a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being over powered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12 [sic] The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.¹⁴²

Even though the judiciary's effort to eliminate the corroboration requirement was beneficial to victims of sexual crime, the logic underlying the reform underscored stereotyped notions of femininity.

Another example of judicial initiative that is indicative of societal bias involves a case where a sixteen-year-old girl was raped by a neighbor's son who was then arrested.¹⁴³ Subsequently, the parents of both arranged for them to be wed.¹⁴⁴ When bail was requested on the grounds that the young suspect had agreed to marry the girl he raped, the judge realized that the girl would not proceed with the case against her new fiancé and decided to grant bail. In so doing, the Judge "warned the boy that . . . if he doesn't keep his promise and marry the girl, the court will take action."¹⁴⁵ Critics of such adjudication have said that

Instead of promoting a marital union between the rapist and the

142. *Id.* at 81-83 (citing *Bharwada Bhoginbhai Hirjibhai v. State Of Gujarat*, (1983) 3 S.C.R. 280 (India)).

143. See Krishnan, et al., *supra* note 138, at 184 (reporting findings by a research team's interview with a judge, in Maharashtra, India on Sept. 15, 2011).

144. *Id.*

145. *Id.*

victim, the judge should have educated the girl and her family about the criminality of this behavior. He ought to have been at the forefront of protecting the girl's interests and her rights, and should have had the perpetrator arrested and indicted on criminal charges of sexual assault. The judge's actions of encouraging and endorsing a marriage between the two, taken in the name of harmonizing a 'social situation,' only reifies norms of inequality and perpetuates existing discrimination, sexism, and sexual violence.¹⁴⁶

The fast-track courts may mitigate some of the harm done by untrained, though well-meaning, lower court judges by removing gender-based violence cases from the general pool.

Judicial attitudes toward rape reveal that judges conceptualize rape in the same way as the society in which they dwell,

not as a violation of an individual woman's right to bodily autonomy, but rather, in a more traditional and patriarchal discourse, as a violation of a woman's honor. This honor is in turn closely associated with a family's honor, and the honor of the broader community.¹⁴⁷

For instance, in *Jugendra Singh v. State of U.P.*, the Indian Supreme Court reasoned that, "an offence against the body of a woman lowers her dignity and mars her reputation. It is said that one's physical frame is his or her temple. No one has any right of encroachment."¹⁴⁸ Such rhetoric illustrates a regime in which women are not autonomous and where their worth is defined exclusively vis-à-vis their role as wives, mothers, sisters and daughters. Women enjoy basic human rights to the extent that their male family members do. To shed these biases and attitudes, which undermine the goal of empowering and rehabilitating victims, proper training is essential.

In order to achieve meaningful success in the long-term, fast-track courts for sexual violence must issue decisions that espouse the right reasoning and rhetoric; otherwise they risk falling prey to the same weaknesses and prejudices that create sexual violence in the first place. The conclusions and recommendations section of the Justice Verma Report states:

2. Speedy justice is not merely an aspect of the right to life with dignity, but is essential for efficacy of the law and its desired impact, as well as for prevention of its violation.

146. *Id.*

147. Kapur, *supra* note 101, at 916.

148. JUSTICE VERMA REPORT, *supra* note 7, at 237 (citing *Jugendra Singh v. State of U.P.*, (2012) 6 S.C.C. 297 (India)).

3. Available personnel of the judiciary and the infrastructure, with a few systemic changes can, at least, reduce half the burden of arrears in courts contributing to delays in enforcing the law of the land. Judge strength can be increased in phases without diluting their quality. Our suggestion of eminent retired judges being appointed as ad hoc judges will solve this problem.

4. More effective control of the subordinate judiciary by the responsibility vested in the High Courts would ensure improved performance of the subordinate judiciary, which is the cutting edge of the justice delivery system. The High Courts have the pivotal role in the administration of justice by virtue of Article 235 of the Constitution. They have to lead by practice in addition to precept. The restatement of values of judicial life is a charter of faith for every judicial functionary at all levels.

...

9. Practically every serious breach of the rule of law can be traced to the failure of performance by the persons responsible for its implementation. The undisputed facts in public knowledge relating to the Delhi gang rape of December 16, 2012 unmistakably disclose the failure of many public functionaries responsible for traffic regulation, maintenance of law and order and, more importantly, their low and skewed priority of dealing with complaints of sexual assault.¹⁴⁹

Nevertheless, the initial results of the fast-track courts suggest that the Justice Verma Report's recommendations were only adopted superficially (if at all) and out of context.¹⁵⁰ The problem with staffing fast-track courts with retired judges, for example, is that these judges lack gender-sensitivity training, and are unfamiliar with the appropriate approach to sexual assault trials that would ensure the wellbeing of victims in such trials. In emphasizing the judiciary's inclination to issue harsh sentencing against defendants convicted of sexual crimes, the report indirectly draws attention to several judicial decisions wherein the judge demonstrates explicit bias and prejudice against female rape victims.¹⁵¹

149. *Id.* at 411-13.

150. See Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Rep. on Mission to India*, Human Rights Council, ¶ 50, U.N. Doc. A/HRC/26/38/Add.1 (Apr. 22-May 1, 2013) (by Rashida Manjoo) [hereinafter, *Report on the Special Rapporteur's Mission to India*] ("[T]he laws that were adopted did not fully reflect the recommendations of the Verma Committee. The opportunity to adopt a holistic approach to violence against women, including addressing the root causes and consequences of such violence, was lost.").

151. See JUSTICE VERMA REPORT, *supra* note 7, at 236-38. Consider the previous example of *Jugendra Singh v. State of U.P.*, where the Indian Supreme Court characterized gender violence as an offense against the honor and reputation of a woman. The same opinion goes on to state that "[a]n attempt for the momentary pleasure of the accused has caused the death of a child

IV. SPECIALIZED DOMESTIC VIOLENCE COURTS

Devoting resources, albeit on an ad hoc basis, to create specialized courts focused on violence against women demonstrates that sexual crime will not go unpunished and its victims will not be overlooked.¹⁵² However, from a normative standpoint, it is imperative to also consider the training of the "specialist" judges and staff to handle their cases. The success of specialized courts, albeit outside the fast-track context, is based on certain best practices which should be incorporated in India's fast-track courts at an early stage to "develop model protocols that guide all further coordinated intervention to prevent and address sexual assault."¹⁵³ This is particularly critical as the fast-track courts rapidly proliferate across India.

Perhaps the best-known, if not most similar,¹⁵⁴ iteration of specialized courts focused on gender violence that pre-date the Indian fast-track courts are the Problem-Solving Courts introduced in the United States in 1946 by Judge Anna Moscowitz Kross in the New York City's Magistrates Court system.¹⁵⁵ A longtime women's rights activist, Judge Kross began by campaigning against the New York Women's Court, which handled cases involving sex workers.¹⁵⁶ Then, using the existing framework of the Magistrates' Courts, she created a new venue, called the Home Term Court Part for the prosecution of non-felony domestic violence.¹⁵⁷ This precursor to modern criminal domestic violence courts was problematic because it

and had a devastating effect on her family and, in the ultimate eventuate, on the collective at large. When a family suffers in such a manner, the society as a whole is compelled to suffer as it creates an incurable dent in the fabric of the social milieu." *Id.* at 237 (citing *Jugendra Singh v. State of U.P.*, (2012) 6 S.C.C. 297 (India)).

152. Although the caste and other cultural dimensions of sexual crime that were previously discussed are unique to the Indian context, the South African government's recognition "that its 'anti-rape strategy' must address the wider social acceptance of rape and sexual violence against women and children in order to make real impact," highlights the impact that fast-track courts in India can have on normative change. European Parliament Directorate-General for Internal Policies, Policy Dep't C: Citizen's Rights and Constitutional Affairs, *Overview of the Worldwide Best Practices for Rape Prevention and for Assisting Women Victims of Rape*, at 161 (2013) [hereinafter, *Overview of the Worldwide Best Practices for Rape Prevention*], [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493025/IPOL-FEMM_ET\(2013\)493025_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493025/IPOL-FEMM_ET(2013)493025_EN.pdf).

153. *Id.* (recommending the U.S. National Sexual Violence Resource Centre, for a series of protocols developed in communities across the United States).

154. "Sexual offences courts" or "SOCs" are specialized courts—albeit without the "fast-track" element—that have existed in South Africa since 1993, and offer another useful analog for comparison. See MASTOERA SADAN ET AL., INST. FOR A DEMOCRATIC ALT. IN S. AFR., PILOT ASSESSMENT: THE SEXUAL OFFENSES COURT IN WYNBERG & CAPE TOWN AND RELATED SERVICES 5 (2001), http://www.endvawnow.org/uploads/browser/files/assessment_sexual_offences_courts_sa.pdf.

155. Mae C. Quinn, *Anna Moscowitz Kross and The Home Term Part: A Second Look at the Nation's First Criminal Domestic Violence Court*, 41 AKRON L. REV. 733, 736 (2008).

156. *Id.* at 737.

157. *Id.* at 742.

reinforced heteronormative, white, upper-class values and also downplayed the safety and security of victims while emphasizing rehabilitation for defendants. In other words, it reinforced conceptions of women “as wives, mothers, and homemakers”—that is, relative to their male family members.¹⁵⁸

Decades later, spurred by the rapid increase in domestic violence cases and the decline in resources, the prosecution of such crimes was revised to include the creation of specialized courts.¹⁵⁹ The district court in Quincy, Massachusetts opened in 1987 and was the first venue to offer specialized processing of criminal domestic abuse prosecutions in the modern era.¹⁶⁰ Unlike the Home Term Court, it focused on empowering victims and offering an integrated approach towards combating domestic violence in the court system.¹⁶¹ The system was deemed successful when the number of deaths from battering declined in 1991.¹⁶² Future courts, including the Dorchester Domestic Violence Court—which is the only existing specialized court in Massachusetts—learned from the Quincy example and addressed flaws such as the confusion between criminal and civil matters and the resulting “web of jurisdictional limitations.”¹⁶³

Following the trend of “problem-solving” courts, the first full-fledged domestic violence court was established in Brooklyn, New York in 1996.¹⁶⁴ This court, which later served as the model for similar courts across the country, “featured a single presiding judge, a fixed prosecutorial team, and a court staff who received special training in domestic violence issues.”¹⁶⁵ Important elements of the court included special training not just for court personnel but a broader educational campaign to “change the way the criminal justice community viewed domestic violence.”¹⁶⁶

Contemporary iterations of specialized courts combine the following best practices that can guide fast-track courts: (1) Better information made available to judicial staff through training and efficient delivery of comprehensive information from the investigative process (including information about the physical and psychological health of defendants and victims, their education, employment, health, mental illness, and other issues for justice officials); (2) Community engagement with the public to encourage trust and cooperation between the judicial system and the general public; (3) Collaboration between legal officials (judges, prosecutors, attorneys), social service providers, victim groups, and schools to ensure consistency and avoid redundancy; (4) Individualized focus on justice to ensure victims’ privacy and willingness to testify, as well as to

158. *Id.* at 759.

159. Anat Maytal, Note, *Specialized Domestic Violence Courts: Are They Worth The Trouble in Massachusetts?*, 18 B.U. PUB. INT. L.J. 197, 197-98 (2008).

160. See Quinn, *supra* note 155, at 734.

161. See Maytal, *supra* note 159, at 214.

162. See *id.* at 214-15.

163. *Id.* at 215.

164. See Quinn, *supra* note 155, at 735.

165. See Maytal, *supra* note 159, at 209 (citation omitted).

166. *Id.* (internal quotation and citation omitted).

ensure victims are receiving social services and support to aid in their recovery; (5) Ongoing outcome evaluation to measure the relative success of the specialized courts against their non-specialized counterparts, to measure cost versus benefit and to ensure adaptability based on changing needs.¹⁶⁷ Each is discussed below in more detail.

A. Training

Judges in the fast-track court system in India are asked to play an active role in the proceedings, stepping in for the prosecutor to elicit the truth and ensure justice. Therefore, that fast-track judges are carefully chosen and properly trained is at least as important as reducing docket sizes.¹⁶⁸

In addition to gender training, judicial officers in the fast-track court system must receive training regarding caste issues. Some commentators argue that an affirmative action program known as the government reservation system should be extended to the judiciary to ensure that there are low-caste judges in the system.¹⁶⁹ The hope is that including low-caste judges will minimize and eventually eliminate the implicit and explicit caste-centric biases that are present in judicial decision making.¹⁷⁰

While the pool of retired judges earmarked for the earlier iteration of non-specialized fast-track courts may present an accessible option for staffing the specialized fast-track courts, their selection process must be carefully articulated to mitigate the dual threats of inherent bias and lack of oversight. Judges must be carefully vetted to ensure an unbiased and open-minded approach to adjudication. This can be accomplished through review of judicial decisions issued during the tenure of the judge. The

167. ROBERT V. WOLF, CTR. FOR COURT INNOVATION, BUREAU OF JUST. ASSISTANCE, *PRINCIPLES OF PROBLEM-SOLVING JUSTICE* (2007) [hereinafter, *PRINCIPLES OF PROBLEM-SOLVING JUSTICE*], <http://www.courtinnovation.org/sites/default/files/Principles.pdf>. Given the fast-track courts' explicit focus on deterrence through punishment, the principle of offender accountability via compliance monitoring (presumably for consequences other than state incarceration) that is part of the specialized court scheme in the United States is not applicable in the Indian context.

168. See JUSTICE VERMA REPORT, *supra* note 7, at 298 ("The courts have to take a participatory role in the trial and not act as mere tape recorders to record whatever is being stated by the witnesses. The judge has to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, the court can control the proceedings effectively so that the ultimate objective that is the truth is arrived at. The court must be conscious of serious pitfalls and dereliction of duty on the part of the prosecuting agency. Upon failure of the prosecuting agency showing indifference or adopting an attitude of aloofness, the judge must exercise the vast powers conferred under Section 165 [sic] of the Evidence Act and Section 311 of the CrPC to elicit all necessary materials by playing an active role in the evidence collecting process.").

169. Sarkin & Koenig, *supra* note 29, at 551.

170. See, e.g., *State of Karnataka v. Appa Balu Ingale*, (1995) Supp. 4 S.C.C. 469, 484 (India) (appealing blatantly discriminatory decision of High Court for the State of Karnataka to the Supreme Court. The presiding judge at the state level had dubiously thrown out testimony by Dalit people for being untrustworthy. Without this testimony, the judge ruled in favor of the high caste defendants, who had been convicted in lower courts of preventing the Dalit plaintiff from using the community well at gunpoint.).

selected judges should undergo mandatory training that consists of gender-sensitization and exposure to sexual assault scenarios. In this way, the biases that have historically been present in Indian judicial decision-making will be minimized.

Recognizing the need for judicial training in cases relating to women, India's National Commission on Women created a training manual and sponsored a workshop called "Gender-Sensitization of Judicial Officers."¹⁷¹ The National Commission for Women has a constitutional and statutory mandate and was established in 1992.¹⁷² Headed by a Chairperson appointed by the President of India, the Commission is empowered to investigate and ensure compliance with laws relating to women. Under the leadership of Chairwoman Vibha Parthasarathy, the Commission rolled out this training program for judicial officers at all levels in June 2001. The training workshop covers topics ranging from gender equality in the workforce to the treatment of women prisoners and includes a section devoted entirely to the crime of rape and violence against women more generally.

The training emphasizes the need for gender-sensitizing trainings for judges in part because they are members of the same society that produces other actors in the criminal justice system. Therefore, "they also cannot be entirely free from the value system, the prejudices, the biases and stereotypical views."¹⁷³ The goal of gender-sensitizing programs is to prevent the judges' biased views from being reflected in the evaluation of evidence and formulation of judgments.¹⁷⁴

Moreover, training judges on implementing victim or witness protection programs and providing holistic support to the victim over the course of the trial can also reduce the likelihood of victim withdrawal. Engaging with the judicial system can either prove cathartic for victims and aid in rebuilding their lives, or result in further victimization and agony:

Perhaps the most agonizing experience for victims involves dealing with the criminal justice system if and when an offender is apprehended. At this level, the crime is considered to have been committed against the state, and victims become witnesses to the crimes. This procedure is very difficult for the crime victim to understand and come to terms with, because in the victim's mind, he or she is the one who has suffered emotionally, physically, psychologically and financially. At this stage of the process, a victim can sometimes feel that he or she is losing complete control because he or she is not directly involved in the prosecution or sentencing of the offender. However, participation in the criminal

171. N.R. MADHAVA MENON, ET AL., NAT'L COMM'N FOR WOMEN, COURSE CURRICULUM ON GENDER SENSITISATION OF JUDICIAL PERSONNEL (A TRAINING MANUAL INCLUDING OBJECTS, METHODS, AND MATERIALS) (2001), <http://ncw.nic.in/frmpubreport.aspx>.

172. *Id.* at 10.

173. *Id.* at 15.

174. *See Id.*

justice system can aid victims in rebuilding their lives. If victims are kept well-informed about the criminal proceedings and feel that they have a voice in the process, they will feel that they are a part of a team effort. This added effort enables victims to understand the judicial process and helps to return to them a sense of control to their lives and circumstances.¹⁷⁵

Judicial training can help ensure that victims have a positive experience with the criminal justice system. As a result, victims will be more likely to participate in the deterrent impact that fast-track courts are intended to have on crime.

The concept of judicial training with respect to women's issues is not new to India. Between 1996 and 2002, a British-Indian initiative called The Indo British Gender and Law Education for the Judiciary project was undertaken to provide gender education of lower-level judges.¹⁷⁶ Thirty-one male and twelve female District and Sessions court judges from all over India were selected to participate by their respective High Courts.¹⁷⁷ The main objectives of this educational project aimed to:

Facilitate discussion of gender issues by using both national and international research and experience; to develop suitable training materials which would be used initially to train a core of key judicial staff and be modified thereafter for incorporation into the common curriculum for judicial officers being developed by the National Judicial Academy [an institution set up pursuant to the Indian Supreme Court's ruling in *Judges Association v. Union of India* (1991)].¹⁷⁸

The British director of the project, Ann Stewart, later interviewed the participants who said the training had proved invaluable and opened their eyes to a host of issues relating to gender in their courtrooms. For the first time, judges could

identify inequalities being faced by women which they now recognised they had ignored as 'mere routine behaviour' before. This new understanding translated into actions such as trying to compensate for procedural delays and 'adopting procedures and methods which enable women, children and infirm persons to come forward and give evidence to their satisfaction.' They took a

175. NEW YORK CITY ALLIANCE AGAINST SEXUAL ASSAULT, FACTSHEETS: TRAUMA OF VICTIMIZATION (2001), http://www.svfreennyc.org/survivors_factsheet_49.html#6.

176. Ann Stewart, *Gender and Judging in India*, REVISTA FORUMUL JUDECATORILOR, no. 3, 2012, at 82-84.

177. *Id.*

178. *Id.* at 84. The Supreme Court issued a directive to establish the All India Institute for the training of higher officers of the judiciary, and a state level institute for training subordinate judges within each state or union territory. *Id.* at 83.

fresh approach to the appreciation of evidence recognising that the way in which the evidence is given can have a crucial bearing on the weight given to it. They reported that they were less concerned with 'minor omissions and contradictions' in witnesses' evidence in rape cases. They suggested that they are able to understand how difficult it is to give evidence in such cases. 'I realise that before the training I was stereotyping the witness expecting her to respond as I would. Now I appreciate evidence from the victim's position.' They were much more vigilant in ensuring that cross examination of victims was 'restricted and to the point.' They are more aware of the gender context and take care to avoid stereotyping.¹⁷⁹

The Justice Verma Report has also urged the government to enact judicial reforms to ensure that "properly sensitized judges" conduct rape trials in fast-track courts.¹⁸⁰ The Justice Verma Report recommends that the Chief Justice of the High Court select judges to serve on these courts and that their workload be conscientiously allocated. Above all, in-camera trials must aim to create a friendly and non-hostile environment for a victim who must not be made to re-live the trauma of rape due to judicial negligence or insensitivity. While the Justice Verma Report is somewhat heavy-handed in prescribing involvement by the judiciary in several areas, the recommendation that High Courts issue appropriate guidelines for in-camera proceedings in sexual assault cases is well placed.¹⁸¹

Based on the experiences of the specialized domestic violence courts and related mechanisms, a combination of specialized training for judges and court staff, and an effort to educate the public about sexual crime within the justice system will ensure the efficacy and long-term success of the Indian fast-track courts. Training and increased judicial sensitivity must be hallmarks of these fast-track courts, which engage judges or teams of judges to hear cases about sexual crime exclusively or as their primary assignment. These specially trained judges will not only relate better to victims but will also have the ability to better sanction perpetrators. As in the domestic violence context, greater judicial oversight in rape cases will give victims and members of the public greater faith in the justice system overall.

Fast-track judges have already seen the benefits of enhanced training when provided. "There is also a trickle-down effect as the judge serves as an example for the rest of the staff."¹⁸² One presiding judge in Delhi observed that, "being placed in a fast-track court gives [a judge] the freedom to hold regular meetings with her staff to help them to understand the nature of cases being handled."¹⁸³

179. *Id.* at 88.

180. See JUSTICE VERMA REPORT, *supra* note 7, at 290.

181. *Id.* (citing *Virender v. The State of NCT of Delhi*, (2009) CrI.A.No. 121/2008 (Del.) (India)).

182. *How fast are fast-track courts?*, *supra* note 115.

183. *Id.*

B. *Community Engagement*

Traditionally, courts maintain distance from their local communities in order to maintain impartiality. The U.S. specialized problem-solving courts consciously deviated from this model to focus on community engagement because communities are a source of valuable information. By fostering trust in the system, community engagement made members of the public more likely to support and participate in court proceedings.¹⁸⁴ Similar considerations caused nascent judicial bodies in transitional or post-conflict states to focus on community engagement as well.¹⁸⁵ Community engagement for the fast-track courts is critical, particularly in rural parts of the country.

This is due to the strong community-based informal justice system that pervades rural India and poses significant challenges to the normative progress and other benefits that fast-track courts can render. Informal justice systems play an integral role in the socio-legal fabric of many legally pluralist societies. In India, these informal legal systems often predate formal courts of law, and are unlikely to cease their traditional practices, many of which involve long-held beliefs about the inferiority and vulnerability women. As a result, these systems can pose significant obstacles for normative change.

India's informal system of justice is comprised of "caste panchayats,"¹⁸⁶ a traditional, community-based system of governance that co-existed with more formal, colonial-style national governance institutions. Today, "[t]hough not formally recognized by law, India's 'caste panchayats,' each made up of influential men from a particular caste or village, function like alternative courts."¹⁸⁷ At best, panchayats offer victims of sexual violence a more—or even the only—accessible avenue for redress. At worst, panchayats are an unregulated and unreliable source of "justice" that runs counter to the judicial principles and legal theories espoused by formal courts.

Panchayats are generally more accessible than typical courts of law, particularly in areas with large rural or transient populations. They are also less resource-intensive, and therefore more sustainable in areas with limited

184. PRINCIPLES OF PROBLEM-SOLVING JUSTICE, *supra* note 167, at 4-5.

185. For example, in post-conflict Sierra Leone, a specialized court was established as a hybrid effort between international and national governments and based entirely on voluntary funding by peace-loving states. It is lauded as one of the most successful transitional justice mechanisms in part because it had an effective "outreach" or public relations program that provided an accessible two-way channel of communication between the population and the court. PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS: THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1359, 1404 (2013).

186. Panchayats, which translate literally to mean "council of five," are comprised of an elected village council of five in most if not all the far-flung rural villages of the Indian subcontinent. Panchayats formed the cornerstone of the local governance systems during colonial rule and were recognized and assimilated by the national government post-independence. Sara Kuipers Cummings, *Liberia's "New War": Post-Conflict Strategies for Confronting Rape and Sexual Violence*, 43 ARIZ. ST. L.J. 223, 250 (2011).

187. *Id.* at 254 (citation omitted).

judicial budgets. In India, such informal justice systems are thriving and often represent the first and last resort for victims of crime.¹⁸⁸ In a system where social norms leading to gender violence have yet to catch up with laws on the books banning it, informal justice—which operates in places where social norms thrive unchecked, information dissemination is irregular, and the force of law is unreliable—is a thorny counterpart to the formal justice system. Informal systems are not equipped, as things stand, to address the socio-cultural impetus for gender violence that is endemic or inherent to the society.

Moreover, when addressing gender violence, India's informal justice system oscillates between radically divergent systems of (1) retribution, focused exclusively on punishing the offender to exact revenge rather than deter future crime,¹⁸⁹ and (2) distorted "restorative justice," focused effectively on "restoring" the offender through forgiveness.¹⁹⁰ These objectives underscore the cultural and social norms that accept gender inequality and undermine the potential for fast-track courts to deter sexual crime by changing these norms.

Indeed, this understanding of restorative justice, or custom of "forgiveness" which pervades the informal justice system in India, has come under fire from women's rights quarters even in the context of two of the most renown transitional justice regimes—namely in post-conflict Sierra Leone and post-apartheid South Africa. In Sierra Leone, the transitional justice regime granted blanket amnesties for horrific crimes of gender violence in the belief that it was necessary for the sake of peace and reconciliation. Instead, amnesties reinforced a culture of impunity and encouraged future crimes; indeed, brutal acts of violence continued unabated.¹⁹¹ Critics of South Africa's Truth and Reconciliation Commission—a restorative justice response to address widespread human

188. See *Report on the Special Rapporteur's Mission to India*, *supra* note 150, at ¶ 35 ("Informal dispute settlement alternatives are often sought, allegedly by police, family members or community leaders . . . To be able to officially report complaints and continue throughout the often lengthy judicial process in safety and with an adequate standard of living is not an option for many women.").

189. This emphasis on revenge is atypical of informal justice systems, which are more victim-centric, and eclipses even the conventional criminal justice system's focus on punishment to deter future crime. See e.g. Cummings, *supra* note 186, at 248-49 (noting that the emphasis of retributive justice on punishing the offender "is most often the domain of the conventional criminal justice system.") (citation omitted).

190. The U.N. has loosely defined restorative justice programs in their applicability to domestic criminal justice systems. See E.S.C. Res. 2000/14, U.N. Doc. E/2000/30 (July 27, 2000). Alternative justice systems in India, which are community-based, are primed to incorporate formal elements of restorative justice (i.e. to recognize that a crime is committed against a particular individual rather than the abstract state), thereby affording victims the opportunity to engage more actively in resolving their case. By contrast, in the United States, restorative justice is a doctrine that uses restorative processes—such as those where the victim, the offender and/or any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, often with the help of a fair and impartial third party—or that aims to achieve restorative outcomes, which are typically designed to achieve reparation for the victim and community and reintegration of the victim and/or the offender.

191. See ALSTON & GOODMAN, *supra* note 185, at 1404.

rights violations in the aftermath of the apartheid regime—have contended that “restorative justice unfairly tars legitimate demands for retribution as atavistic vengefulness and thus short-changes victims.”¹⁹² Like the victims in Sierra Leone and South Africa, the victims of sexual violence in rural India may feel “pressured” by their communities and the informal justice system to “forgive offenders before they are psychologically ready to do so.”¹⁹³ By actively engaging with the informal justice system, the fast-track courts can mitigate some of this harm. Through their association with the undeniably well-established informal justice system, the fast-track courts will also gain visibility and perhaps appear more accessible to victims.

C. Collaborative Partnerships

A spokesperson at Delhi State Legal Services Authority, a statutory agency that provides indigent legal aid in Delhi, remarked that “When fast-track courts were conceived, was any thought given to fast-tracking investigation or providing a special procedure different from the routine procedure? A holistic approach is missing.”¹⁹⁴ Collaborative partnerships address these concerns in two ways. First, fast-track courts should incorporate the relevant actors into their daily operations. A thoughtful collaborative approach would minimize the distance between law enforcement investigators, prosecutors, victims’ advocates, and even defense attorneys in order to reinforce the speed and underlying efficiency of fast-track trials. Second, fast-track courts should approach community engagement from a collaborative perspective—in other words, the previously discussed community engagement between fast-track courts and informal justice systems should be a bilateral effort, with give and take on both sides.

In terms of incorporating relevant actors into their daily operations, the U.S. specialized problem-solving courts achieve this by building on the central position that courts occupy in a complex system that involves many actors. As with community engagement, the goal of collaborative partnerships is information exchange and building trust.¹⁹⁵ Collaborative partnerships can target specific individuals or agencies rather than a community as a whole.

Borrowing from this model, fast-track courts should conscientiously create avenues for law enforcement investigators, health care providers, social workers, prosecutors, and defense attorneys to work together in the day-to-day administration of the fast-track courts. In addition to facilitating information exchange and building trust in the courts, collaborative partnerships offer benefits on behalf of victim autonomy, fundamental

192. See Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 15 (2006) (citation omitted).

193. *Id.* (citing Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community, and Justice*, 52 STAN. L. REV. 751, 762-63 (2000)).

194. *How fast are fast-track courts?*, *supra* note 115 (quoting S.S. Rathi).

195. PRINCIPLES OF PROBLEM-SOLVING JUSTICE, *supra* note 167, at 5-6.

human rights, and physical security.¹⁹⁶ Collaborative partnerships also serve the interest of speeding up prosecutions by streamlining the judicial process.

Adopting a collaborative approach to address escalating sexual violence can also appease concerns over the feminist-police/judicial power alliance, which focuses on the criminal system as a remedy for sexual assault and negatively impacts women's agency by casting them as victims.¹⁹⁷ As one scholar has argued, "rape reform's myopic focus on women as victims runs counter to a thick view of female autonomy."¹⁹⁸ Although most scholarship has addressed the American criminal justice system, arguably the most punitive in the world, the same critique holds true in India.¹⁹⁹ That said, perhaps it is true that the benefits of heavy criminalization of rape and strengthening state-involvement in sexual behavior outweighs any negative effects on agency and autonomy.²⁰⁰ Moreover, it is also possible that criminal law can punish rapists "without relegating women survivors to the status of objectified child-like victims."²⁰¹

The specialized domestic violence court in Brooklyn showed marked success in just five years, according to the Urban Institute's Justice Policy Center,²⁰² and has served as a model for nearly thirty other domestic violence courts in other New York jurisdictions.²⁰³ In addition to providing special training to all court staff, the domestic violence courts have made a concerted effort to provide more comprehensive and holistic responses to domestic violence crimes.²⁰⁴ They have done so by coordinating with so-called court "partners,"—i.e. other agents of civil society who could positively influence the problem of domestic violence, namely, judges,

196. As Ariel Dulitzky writes about the Inter-American Human Rights regime, "what makes a human rights body effective and how the pursuit of efficacy could complement or contradict the purpose of being an effective adjudicator simultaneously . . . [requires a] goal-based definition of effectiveness . . . in order to both assess the performance of the Commission and the possibilities and limitations of the measures that the Commission could adopt to speed up its process, and to deal with its current backlog." Ariel Dulitzky, *Too Little, Too Late: The Pace of Adjudication of the Inter-American Commission on Human Rights*, 35 LOY. L.A. INT'L & COMP. L. REV. 131, 137 (2013).

197. Extending concerns raised by Aya Gruber over the "feminist-police power alliance" to judicial officers in fast-track courts who may inadvertently deprive victims of their agency and autonomy, by focusing exclusively on the perpetrator or future harm to the community. Aya Gruber, *Rape, Feminism and the War on Crime*, 84 WASH. L. REV. 581, 608 (2009).

198. *Id.*

199. Particularly given the language of some of the judicial decisions discussed above. Even some of the word choices evident in the Justice Verma Report and the new legislation establishing fast-track women's courts reveal unintended biases against women and stereotyped conceptions about gender.

200. *Id.* at 611.

201. *Id.*

202. The Urban Institute's Justice Policy Center is a think tank that evaluates justice policy and practice at the national, state, and local levels and identifies avenues for reform. See *Justice Policy Center: About*, URBAN INSTITUTE (2016), <http://www.urban.org/policy-centers/justice-policy-center/sound-strategies-combating-crime-and-promoting-public-safety>.

203. Maytal, *supra* note 159, at 210.

204. See *id.* at 216.

court personnel, victim advocates, prosecutors, defense attorneys, probation and parole officers, representatives from batterers programs, and social service agencies.²⁰⁵ Such a collaborative approach can also be transposed to the Indian fast-track system and may serve to further alleviate the burden on the judiciary's limited resources.

In the United Kingdom, reformers have recognized the need to speed up the process of criminal trials for domestic violence cases.²⁰⁶ Indeed one of the main goals for implementing specialized courts is to accelerate the process from initial charge to final appearance. The length of time has decreased significantly with the advent of such special courts.²⁰⁷ Additionally, some good practices can further aid in reducing the duration of trials and to minimize delays—whether induced by defense tactics designed to make a victim withdraw or stemming from legitimate causes.²⁰⁸

In India, communication between the various stakeholders in the prosecution of sexual crime is muddled. A government spokesperson involved with Delhi's sexual crime fast-track courts has admitted that the various criminal justice agencies involved "never meet . . . we need to communicate."²⁰⁹ Some best practices that Indian fast-track courts can implement to minimize delays include: First, the presence in court of a specialist police officer able to respond quickly to the court's requests for information and action. Requests might include initiating risk assessments, or tracking down missing evidence.²¹⁰ Second, increased cooperation between the police and victims' advocates facilitates information sharing and ensures that the court has immediate access to the most accurate information.²¹¹ Third, court clerks must maintain clear and detailed logs of court proceedings and keep track of any related parallel proceedings in civil courts.²¹²

D. Collaborative Community Engagement

With respect to the community engagement aspect of collaborative partnerships, fast-track courts should actively integrate informal justice systems, or at least certain elements, into the formal, fast-track system. Members of the fast-track court system can look to Sierra Leone as an example of a developing nation where formal and informal justice systems worked in tandem for the common goal of reducing sexual violence against women.

205. *Id.* at 209.

206. See DEE COOK ET AL., EVALUATION OF SPECIALIST DOMESTIC VIOLENCE COURTS/FAST TRACK SYSTEMS 70-71 (2004) [hereinafter EVALUATION], <https://www.cps.gov.uk/publicationsdocs/specialistdvcourts.pdf>.

207. *See id.*

208. *Id.*

209. *How fast are fast-track courts?*, *supra* note 115 (quoting S.S. Rathi).

210. EVALUATION, *supra* note 206, at 71.

211. *Id.*

212. *Id.*

Like India, Sierra Leone has a bifurcated legal system—a formal system based on the laws of the former colonial master, and an informal system based on “customary” norms derived from traditional approaches to justice.²¹³ Formal courts are concentrated in the nation’s capital and only a handful of magistrates and high court judges sit in courts in rural areas. Access to justice in the countryside is therefore scarce, and made worse by the fact that there are only one hundred practicing lawyers in the country.²¹⁴ As a result, rural “chiefdoms” commonly take justice into their own hands by resolving disputes through “customary” courts. Although these courts are required by law to reserve serious crimes carrying longer sentences and higher monetary fines for the formal courts, this jurisdictional boundary has not always been respected.²¹⁵ Moreover, the few remaining lawyers in Sierra Leone are forbidden from practicing in customary courts at the chiefdom level.²¹⁶ Consequently, the country’s rural system of justice—administered primarily through informal courts—exhibits draconian tendencies.²¹⁷

Inspired by the success of paralegal services programs in rural South Africa, Timap for Justice—a well-established community-driven NGO in Sierra Leone—implemented a rural paralegal program to improve access to justice in poor, rural communities at the chiefdom level.²¹⁸ Timap for Justice has enjoyed anecdotal success.²¹⁹ The rural paralegal program trains “local lay people with access to lawyers for advice and support. As locals, they understand community dynamics and have the flexibility to work for community-wide solutions as well as serving individual needs.”²²⁰ Timap enjoys wide acceptance and legitimacy even though it is independent from the government and the judicial branch.²²¹ “Such community-driven legal services are not new. They have emerged in various forms in Bangladesh, Botswana, Malawi, Mozambique, South Africa, and the Philippines. In some cases, they are sanctioned by the courts and funded by the government as community-based extensions of government services, while in other scenarios, they are independent and raise funds through donors or small fees.”²²²

Knowing that fast-track courts will likely be inaccessible to many, these courts may consider collaborating with rural communities by similarly training local lay people who then work under the general supervision of judicial officers and staff from the fast-track courts to provide access to

213. Vivek Maru, *Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide*, 31 YALE J. INT’L L. 427, 436 (2006).

214. *Id.*

215. *Id.*

216. *Id.* at 441.

217. *Id.* at 431-37.

218. *Id.* at 441.

219. Amos Sawyer, *Reconstructing the Rule of Law*, HARV. INT’L REV. (Dec. 19, 2008), <http://hir.harvard.edu/archives/1792>.

220. *Id.*

221. *Id.*

222. *Id.*

victims of sexual crime. Rather than being independent of the judiciary and affiliated with a rural paralegal training program, the training here would be provided directly by the fast-track courts, which have developed expertise in the subject matter. In engaging with the "local lay people" in parts of rural India, the fast-track court staff and judicial officers will gain greater insight and understanding of local norms and values which they can then address as necessary.

E. *Individualized Justice for Victims*

Fast-track courts with their specialized focus are well-suited to address and accommodate the needs of victims in the immediate aftermath of a sexual crime and during the pendency of a trial—typically when victims are most in need of comprehensive services. Although the Justice Verma Report recommended the holistic provision of services to victims,²²³ it is unclear whether the fast-track courts have implemented the recommendation in practice.

Again, the U.S. example provides some useful lessons. Some problem-solving courts in the United States act as one-stop-shops for the centralized provision of multiple services that make it easier for victims to access the help they need.²²⁴ While specialized courts such as drug and mental health courts that involve victimless crimes focus primarily on serving offenders, specialized domestic violence courts provide services to victims, including access to basics like shelter, safety planning, and advocacy.²²⁵

Incorporating the individual needs of each victim into the daily operation of the fast-track courts prevents or minimizes "re-victimization" or "the sense that victims are abused twice: once by the batterer and again by the system."²²⁶ Moreover, it increases the likelihood of the victim's involvement in the case and shields them from external pressure to remain silent.²²⁷ This means that fast-track courts should be removed from other court facilities and thoughtfully designed with amenities such as separate waiting areas for victims and even separate "camera rooms" to shield victims from testifying in front of the perpetrator.²²⁸

223. See JUSTICE VERMA REPORT, *supra* note 7, at 281-87 (discussing the "starting point for arriving at a standardised protocol" for the role of police, hospitals/doctors, Committees, Sessions Courts, Magistrate Courts, child welfare agencies, prosecutors and other concerned authorities in cases of sexual offences); see also *Report on the Special Rapporteur's Mission to India*, *supra* note 150, at ¶ 50 (referencing the holistic approach recommended by the Justice Verma Report).

224. PRINCIPLES OF PROBLEM-SOLVING JUSTICE, *supra* note 167, at 7.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Overview of the Worldwide Best Practices for Rape Prevention*, *supra* note 152, at 94. There are reports that some district courts in Delhi—though it is unclear whether this is mandatory or limited to fast-track courts—have already been using "so-called 'vulnerable witness' courtrooms where the evidence of those who have been sexually assaulted is recorded," as needed during sexual crime prosecutions. *How fast are fast-track courts?*, *supra* note 115.

Critics of specialized domestic violence courts argue that the “epistemological limitations and systemic biases inherent in the judicial system—including . . . prevailing assumptions about the needs and characteristics of victims, and an institutional orientation toward law enforcement goals” remain unresolved in specialized settings.²²⁹ While these nuanced concerns are important, they must not prevent fast-track courts from moving forward. Similarly, the unintended impact that participating in a criminal prosecution has on victim empowerment and self-determination²³⁰ should not prevent these courts from existing and operating. Ultimately, the role of the judiciary as therapeutic overseers of a broader-based approach to solving a multifaceted problem is not unprecedented and should not be cursorily dismissed.²³¹

One way to address these criticisms is to mandate a victim’s advocate to act as a court liaison, serving only in the victim’s interest. Indeed, the Justice Verma Report recommends creating a statutory right of due process affording the victim the right to appoint her own lawyer acting independently of the state prosecutor and exclusively on behalf of the victim.²³² While in common law jurisdictions, the notion of a victim’s advocate represents a radical a departure from criminal law and procedure, they have been successfully incorporated into specialized domestic violence courts in U.S. jurisdictions, at least with respect to formulating a general plan of action that allows the victim to access social services while participating in a pending court case.²³³

Differences between domestic violence and the kinds of sexual crimes under the jurisdiction of Indian fast-track courts are significant and should not be downplayed. However, the emphasis on victim safety—including emotional, psychological, physical well-being, and the efficiency of the underlying judicial process—and perpetrator accountability—as opposed to rehabilitation, which once prevailed in the domestic violence courts²³⁴—is common to both contexts.

One case that illustrates the stark contrast in the state’s response to “less-violent” sexual assault is that of thirty-seven year old, Suzette Jordan, the victim in Kolkata’s eponymously-named “Park Street rape.”²³⁵ Jordan’s

229. See Kathryn Gillespie Wellman, *Taking the Next Steps in the Legal Response to Domestic Violence: The Need To Reexamine Specialized Domestic Violence Courts from a Victim Perspective*, 24 COLUM. J. GENDER & L. 444, 446 (2013).

230. See *id.* at 466; see also Gruber, *supra* note 197, at 608 (commenting on rape reform’s myopic focus on women as victims, a view that runs counter to a thick view of female autonomy).

231. See *id.* at 465.

232. JUSTICE VERMA REPORT, *supra* note 7, at 304-305.

233. Victim advocates play critical roles in the U.S. specialized domestic violence courts. PRINCIPLES OF PROBLEM-SOLVING JUSTICE, *supra* note 167, at 3. (“Victim advocates in domestic violence courts conduct intake interviews with victims who are seeking assistance. With knowledge of each victim’s needs, advocates can customize a safety plan to provide appropriate support and resources.”).

234. For example, during the Home Court Part era in the United States.

235. Sandip Roy, *In Memoriam: Suzette Jordan on Her Battle to Stop Being the 'Park Street Rape Victim'*, FIRSTPOST (Jul 2, 2013, 14:44), <http://www.firstpost.com/living/the-long-journey->

story demonstrates how when rape makes news, “the grueling aftermath often wrecks a whole other trauma.”²³⁶ Despite the “blur of pain and humiliation” which ensued after her sexual assault, Jordan attempted to file a report at the local police station, which was staffed entirely by male officers.²³⁷ Jordan recounts that the officers laughed at her and did not take her seriously; instead they made leering comments about Jordan for going out on Valentine’s Day and drinking beer.²³⁸

It is widely accepted that for victims of sexual assault and violence, the potential for further abuse, censure, and public exposure can be as agonizing as the crime itself. In cases such as these, where the violence of the crime was of a lesser degree, the legal process can play a key role in alleviating some of the ill effects that have historically accompanied rape trials. Fast-track courts allow for speedier resolution of cases where victims are otherwise susceptible to pressure to withdraw from a case. Nevertheless, it is imperative that the fast-track courts conscientiously integrate and implement sensitivity to the needs of victims.

Enforcing the criminality of sexual violence against women through the creation of specialized courts sends the message that sexual violence is socially and culturally reprehensible. Dedicating resources to focus on the victim and not simply the speed of prosecution sends the equally important message that victims are never deserving of sexual violence.

F. *Continuous Outcome Monitoring*

Specialized courts are generally more adaptable to local changes. Perhaps by partnering with external agencies such as research universities, non-profit organizations or think tanks, they can collect and analyze data to measure their performance.²³⁹ In addition to measuring the number of cases that are handled over a specific period, the average time it takes to move through the system, the clearance rate, conviction rates, recidivism, and backlog, fast-track courts should also focus on the impact the fast-track system has on victims and communities.

from-park-street-rape-victim-to-suzette-jordan-921463.html.

236. *Id.*

237. *Id.*

238. *Id.*

239. For example, the Centre for Law and Policy Research, a non-profit organization based in Bangalore, India has recently published a study of the impact of fast-track courts in the state of Karnataka. See KOTHARI & RAVI, *supra* note 11. By collaborating with such organizations in states across India, the fast-track system could ensure that outcome monitoring and analysis takes place, and as an added benefit, from the perspective of a non-governmental community enterprise. In a collaborative environment, the findings or study results, whether published or not, are less likely to be overlooked by government agents and should reach the fast-track courts directly.

V. CONCLUSION

Fast-track courts—through their enhanced focus on implementing legislation and expedited procedures—can make strides towards deterring potential offenders. Through their gender-sensitive lens, careful staffing, comprehensive training, and collaborative approaches, they are also uniquely positioned to bring about normative change by reshaping the landscape of caste and other socioeconomic beliefs that influence sexual violence against women.

Although the Indian context for sexual crime has a specific and unique socio-economic and cultural dimension, fast-track justice is not a novel concept in other common law jurisdictions. Indeed, several countries have used such mechanisms to address their particular challenges with respect to gender-based violence. In the United Kingdom, where U.S. specialized domestic violence courts have served as a model,²⁴⁰ civil remedies are accessible to victims of domestic violence in an expedited manner.²⁴¹ In post-conflict Liberia, the creation of specialized sexual violence courts has been one of the most celebrated institutional reforms to address the explosion of such cases in the face of scarce judicial resources.²⁴² The Zambian government also created fast-track courts to deal with gender-based violence.²⁴³

Although fast-track courts have also been established outside the context of gender-based crimes, constitutional challenges (particularly as to criminal defendants' due process rights in light of streamlined and accelerated procedures) are raised and overcome only when the interests to be served by the fast-track courts are especially compelling.²⁴⁴

240. See EVALUATION, *supra* note 206, at 29.

241. *Id.* at 3, 6-8 (discussing the fast-track system in England and Wales).

242. In Liberia, with rape cases looming large even in the post-conflict period, and under pressure from NGOs, in 2008, the government established a special court to address rape and other gender-based violence. Cummings, *supra* note 186, at 239. These measures attempted to address the scarcity of such claims being adjudicated in existing courts. The relative lack of cases was evidently not because there were no sex crimes, but rather because victims did not pursue their cases in court or because prosecutors were too busy responding to other types of crime. The special rape court opened in Monrovia on February 24, 2009, with jurisdiction over "rape, sodomy and other forms of sexual assault, including abuse of minors." *Id.* A female judge was assigned to the court and worked collaboratively with officials from the United Nations and the Liberian government, including public prosecutors, defenders, and health officials to establish operating guidelines. While a special court "promises to give more dedicated attention to rape and sexual-violence prosecutions, it may also raise the necessity of other reforms" to address the "lack of resources and facilities to deal appropriately with victims and to house juvenile offenders separately from adults," for example. *Id.*

243. Following an appeal by the first lady to the Ministry of Justice after the United Nations documented that high levels of inequality between men and women resulted in increasing gender-based violence, the Acting Chief Justice Lombe Chibesakunda "called for legislative amendments to allow for the establishment of fast-track courts" to address the rising tide of gender-based violence in Zambia. Sylvia Mweetwa, *Zambia: Gender Based Violence Fight – Can the Year 2013 Bring Hope?*, TIMES OF ZAMBIA (Jan. 7, 2013). Looking to successes on this front in Brazil, Zambian leaders hope that decreased inequality will result in a reduction in domestic violence. *Id.*

244. In Bahrain, for example, a fast-track human rights court is being established to issue

Interestingly, fast-track justice in the criminal context appears to be exclusive to common law jurisdictions outside the United States and Europe. Similar to the circumstances surrounding the emergence of fast-track courts in India and South Africa, their creation is typically preceded by some high-profile news coverage of crime such as sexual violence against women, or a period of reconstruction following armed conflict, like in Sierra Leone or Liberia. While these examples of fast-track justice share similarities there are also significant differences for the impetus that drives perpetrators to commit sexual crimes in each of the above-mentioned jurisdictions. In India, the culture of impunity that is driven in part by the country's unique socio-economic and cultural norms influences both the prevalence of sexual violence and the fast-track court system.

It remains to be seen what success the Indian fast-track courts will have. Although such efforts in other parts of the world have enjoyed varying degrees of success, they all appear to have withstood concerns over the due process rights of criminal defendants. Without turning this into a full-fledged examination of due process guarantees under the constitution of every state that has established fast-track courts, here are a few reasons why these concerns may be overblown in the Indian context. First, procedural "due process" as understood under the United States Constitution, and its European counterparts, is not a universal construct.²⁴⁵ Furthermore, criminal defendants, like victims, typically fare worse when trials are slow and arduous. Indeed, India's first attempt to streamline procedures to "fast-track" criminal prosecutions was undertaken pursuant

verdicts within six months of receiving complaints. Issues addressed include torture and discrimination—both of which are "compelling" interests that seem to justify the accelerated and streamlined trials. Sandeep Singh Grewal, *Rights Court Will Fast-Track Cases*, GULF DAILY NEWS (May 26, 2014), <http://www.gulf-daily-news.com/NewsDetails.aspx?storyid=37776> 7. In Ghana, the government's fast-track court system to help generally alleviate judicial inefficiency in both criminal and civil cases came under attack and barely withstood constitutional challenges concerning due process. Indeed, the impetus for the courts in Ghana was to reduce case-loads rather than deterring specific crime. In the controversial decision of *Tsatsu Tsikata v. The Republic of Ghana*, where a former Chief Executive of the Ghana National Petroleum Corporation challenged the constitutionality of the fast-track court where he was being prosecuting for financial crimes against the state, Ghana's supreme court ultimately held that the fast-track courts were consistent with the constitution. The court reasoned that because the constitution authorizes the chief justice to create divisions in the courts and the chief justice of Ghana had established the fast-track courts rather than the legislature, the creation of the fast-track system was consistent with the constitution. Moreover, the court concluded that the fast-track courts in Ghana were nothing more than existing "high courts" with certain automated processes. See *Fast Track Courts Are Now Constitutional*, MODERN GHANA (June 26, 2002), <http://www.modernghana.com/news/23697/1/fast-track-courts-are-now-constitutional-sc.html>. The Indian government has also discussed the possibility of using fast-track courts to resolve disputes in the area of high tech commercial law. See LAW COMM'N OF INDIA, ONE HUNDRED AND EIGHTY-EIGHTH REPORT ON PROPOSALS FOR CONSTITUTION OF HI-TECH FAST-TRACK COMMERCIAL DIVISIONS IN HIGH COURTS (2003), <https://indiankanoon.org/doc/185454903/>.

245. "Although the right of independent judicial review has become an *almost* universally applicable norm," there is no "clear *jus cogens* formed around the requirements of due process," and perspectives differ, particularly among Western and non-Western countries. Vanessa Baehr-Jones, *Mission Possible: How Intelligence Evidence Rules Can Save U.N. Terrorist Sanctions*, 2 HARV. NAT'L SEC. J. 447, 488 (2011) (emphasis added).

to Article 21(ii) of the Indian Constitution, which protects the right to a speedy trial as part of the fundamental right to life and liberty.²⁴⁶

Lastly, the fast-track courts are well aware that "[j]ustice delayed is justice denied and justice hurried is justice buried."²⁴⁷ The Indian judiciary famously proclaimed that it would not convict even a single innocent defendant,²⁴⁸ and is therefore notorious for its low conviction rates and for being soft on crime. As a result, fast-track courts are wary of overstepping the bounds of acceptable judicial practice in India. Moreover, in light of the fast-track system's narrow mandate, India's responsibility to protect its citizens is ostensibly more likely to be compromised when victims and communities are left vulnerable to sexual crime rather than when the trial of criminal defendants is swift.²⁴⁹ Surely fast-track courts—which are courts of first instance established alongside other district courts in each Indian state—can find the appropriate balance between speed and due process without prejudicing defendants. After all, their judgments are subject to appeal to the High Courts and ultimately the Supreme Court of India—none of which have corresponding "fast-track" procedures. Ultimately, since swift prosecution is a critical element of deterrence of sexual crime in India, due process concerns raised by the judiciary should be balanced against the reality of the widespread impunity of sexual crimes in India.²⁵⁰

Justice is expensive; expedient, thorough justice is even more so. Although the financial sustainability of the fast-track courts remains to be seen, it is clear that such courts offer an economically viable solution to address impunity for sexual violence in India, at least in the short term.²⁵¹ Thus far, the central and state governments have been reticent to appoint sufficient judges to fill the existing vacancies at both the district and high court levels, despite pressure to do so.²⁵² However, if fast-track courts are

246. *Fast Track Courts Will Speed Up Disposal of Cases: Reddy*, THE HINDU (Nov. 11, 2011), <http://www.thehindu.com/2001/11/11/stories/04112234.htm> (discussing the creation of India's first fast-track courts in 2001).

247. Soutik Biswas, *Do India's 'Fast track' Courts Work?*, BBC NEWS (Jan. 9, 2013), <http://www.bbc.com/news/world-asia-india-20944633>.

248. Richard Calland & Thabani Masuku, *Tough on Crime and Strong on Human Rights: The Challenge for Us All*, 4 L. DEMOCRACY & DEV., no. 1, 2000, at 121-135.

249. *Id.*

250. See *supra* note 244 and accompanying text comparing general fast-track courts designed to address burdensome dockets to fast-track courts created as a response to crisis—whether a specific incident, or recurring pattern; see also Part II.

251. "Under the Fast Track Court Scheme, a sum of Rs. 502.90 crores was sanctioned as special problems and upgradation [sic] grant for judicial administration for five years till 2005." Sridhar, *supra* note 103. That funding was then re-extended until 2011. See breakdown of funding for each year between 2005 and 2011. See *Fast Track Courts*, DEP'T OF JUSTICE, <http://doj.gov.in/other-programmes/fast-track-courts> (last visited July 13, 2016). The next injection of central government funds came in the aftermath of Jyoti Pandey's death, and the fast-track courts established pursuant to that wave of funding are arguably sustainable in the long-term. "Even if the states have to . . . bear the entire expenditure [for fast-track courts in the absence of funding from the central government,] the fund requirement is less than 0.01% of the budget of most states." Dubbudu, *supra* note 106.

252. As of December 1, 2012, there were only 613 High Court judges serving across India as opposed to the sanctioned 895 judges. This reflects a 32 percent vacancy of judges across various High Courts in the country. Similarly, as of September 30, 2011, the sanctioned

paired with extant alternative justice mechanisms, these measures will strengthen the accessibility and viability of the fast-track court system.²⁵³

Lastly, this article recognizes that legal reforms of the formal and informal justice systems in India are by no means the only solution to curbing violence against women. Indeed, doing so might seem to individualize a problem that ultimately has systemic roots.²⁵⁴ As the Justice Verma Report suggests in a chapter dedicated to this issue, educational reform, particularly at the early childhood level, is a key requirement to ignite widespread and systemic change.²⁵⁵ Others argue that economic development and infrastructure, such as improved sanitation facilities, also provide a way to reduce violence against women.²⁵⁶ Nevertheless, short of

number judges at the subordinate or district court level was 18,123 compared with the 14,287 judges then currently serving (i.e. 21 percent vacancy). Pallavi, *An Overview of Fast Track Courts*, PRS BLOG (Dec. 31, 2012), <http://www.prsindia.org/theprsblog/?p=2388>. According to the Chairperson of the Indian Law Commission, "Fast-track courts . . . are not the solution to the problem. Too many cases are being fast-tracked: sexual cases, cases against legislators, corruption cases. But our perspective should be to bring systemic reform to all levels of the judicial hierarchy. Fast-track courts decide the cases in a shorter period, but when the appeals are filed in higher courts they are stuck for a long period." Rukmini Shrinivasan, "Courts should be dealing with serious criminal offences, not with petty cases," THE HINDU (Aug. 23, 2014), <http://www.thehindu.com/opinion/interview/courts-should-be-dealing-with-serious-criminal-offences-not-with-petty-cases/article6342812.ece>. However, it appears that some states are committed to making the goal of deterring sexual crime more than a temporary goal that endures beyond the furor of a high-profile crime. See, e.g., KOTHARI & RAVI, *supra* note 11, at 6 (supporting the proposition that the state government is "closing down 39 fast track courts" and establishing new permanent courts—although it is unclear whether the specialized nature of the fast-track courts will continue when the 39 judicial officers transition into new permanent district courts); see also Notification, High Court of Karnataka, Bengaluru (Mar. 30, 2015), [http://karnatakajudiciary.kar.nic.in/transferNotifications/GOB\(I\)12015.pdf](http://karnatakajudiciary.kar.nic.in/transferNotifications/GOB(I)12015.pdf) (citing Karnataka Government Order No. Law 137 LCE 2014 (Mar. 26, 2015)).

253. An alternative that has been offered to the fast-track courts, is adopting American-style criminal law reform. Such reforms could address backlog in criminal dockets including those dealing with sexual crimes, through increase in plea-bargaining. However, such an alternative lacks the potential to attain the more nuanced goal of reducing backlog while also deterring crime and restoring victims. See generally Allegra M. McLeod, *Exporting U.S. Criminal Justice*, 29 YALE L. & POL'Y REV. 83 (2010) (arguing that the U.S. criminal justice export has played a critical role in shaping how states and non-state actors respond to a range of global criminal justice challenges).

254. Greenberg, *supra* note 71, at 804 ("Finally, the use of criminal law emphasizes individual, rather than systemic, responsibility for domestic violence. This emphasis might seem counterintuitive because declaring a particular form of conduct criminal can be understood as a statement that a significant segment of society opposes such conduct and believes that social resources should be used to prevent it. However, at a more practical, non-ideological level, criminal statutes focus on the injury done by one abuser, usually the husband or his family, to one victim. Individual women must plead their cases on their own. There is no mechanism within the criminal law system for aggregating these cases and bringing a 'class action.' Criminal laws do not place intimate violence in a social context whereby women's lives are subordinated to men's and whereby the violence can occur or continue because women have very few alternatives to life with their husbands. Although the violence would not have been made criminal if it had not been communally identified as a wrong, the focus on individual cases and low conviction rates in these cases undercuts this message.") (citations omitted).

255. See Chapter Fourteen on Education and Perception Reform, JUSTICE VERMA REPORT *supra* note 7, at 383-411.

256. Pronoti Datta, *How Improved Sanitation Can Mitigate Crimes Against Women*, MUMBAI

systemic changes that address the underlying causes of gender-based violence and discrimination, fast-track courts can deter future crime by eroding the culture of impunity that perpetuates gender violence in India.

BOSS (June 2, 2014 7:56 AM), <http://mumbaiboss.com/2014/06/02/how-improved-sanitation-can-mitigate-crimes-against-women/>.

